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# In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-436
No. 75-437

JAMES L. BUCKLEY, et al.,
APPELLANTS,

*v.*

FRANCIS R. VALEO, et al.,
APPELLEES.

ON APPEALS FROM THE COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF OF SENATORS HUGH SCOTT AND EDWARD M. KENNEDY, *AMICI CURIAE*

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FRANCIS R. VALEO, et al.,
APPELLEES.

ON APPEALS FROM THE COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF OF SENATORS HUGH SCOTT AND EDWARD M. KENNEDY, *AMICI CURIAE*

### Interest of the Amici

This case results from a sweeping constitutional attack upon every aspect of the Federal Election Campaign Act of 1971, 86 Stat. 3 (1972), and the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263 (1975).

The thrust of each of appellants' major contentions is that the Congress is powerless to counter either the pressure on candidates in federal elections to raise and spend more and more money from contributors expecting later governmental favors, or the growing public belief that both political campaigns and government itself are a giant "rip-off" by those with large sums of money to give to candidates in order that the candidates may "buy" elections and later give to the contributors governmental favors in return for their largesse.

Hugh Scott is a Republican Senator from Pennsylvania and Minority Leader of the United States Senate. Edward M. Kennedy is a Democratic Senator from Massachusetts. In recent Congresses they were the bipartisan sponsors of the major bills to provide for public financing of elections for President of the United States, United States Senator and United States Representative. Amendment 406 to S.372 (to amend the FECA), 93d Cong., 1st Sess. (1973); S.2297 (to amend Subtitle H of the Internal Revenue Code), 93d Cong., 1st Sess. (1973); Amendment 651 to H.R. 11104 (the Debt Ceiling Act), 93d Cong., 1st Sess. (1973); S.2780, 93d Cong., 1st Sess. (1973); S.3044, 93d Cong., 2d Sess. (1974); S.4196, 93d Cong., 2d Sess. (1974); S.564, 94th Cong., 1st Sess. (1975). The substance of these measures and much of the language were incorporated into provisions of the Federal Election Campaign Act Amendments of 1974, here at issue, which provide for public financing of campaigns for nomination as a candidate for election as President and for the election campaign itself.

Senator Scott and Senator Kennedy also played active roles in the deliberations of the Senate upon all the other provisions of the Federal Election Campaign Act and the amendments of 1974. Both became thoroughly familiar with the evils flowing from spiraling campaign costs and pressure to raise the necessary funds by large private



contributions, and with the problems encountered in framing remedies and the reasoning underlying the congressional decisions. Both were members of the Conference Committee whose report led to enactment of the present law.

The Executive Branch is ambivalent in its position upon the issues. The Solicitor General has signed two briefs, one calling for affirmance and the other stating that he takes no position upon critical constitutional issues. Questions concerning the respective powers of the Congress and the President are at stake in the portion of the case relating to the appointment of members of the Federal Election Commission. These unusual circumstances make it appropriate for the Court to consider a bipartisan submission from two members of the Legislative Branch who were active supporters of the challenged measure.

## Questions Presented

Twenty-eight certified questions are before this Court under the special statutory procedure (2 U.S.C. § 437h) which calls for expedited rulings upon the constitutionality of the Federal Election Campaign Act of 1971, P.L. 92-225, 86 Stat. 3 (1972), 2 U.S.C. (Supp. III) §§ 431 *et seq.*; and the Federal Election Campaign Act Amendments of 1974, P.L. 93-443, 88 Stat. 1263 (1975). In substance, there are five central questions:

1. Has Congress power to legislate with respect to financial contributions and expenditures in political campaigns for election to federal office?

2. Do the restrictions imposed by the Federal Election Campaign Act upon the size of contributions to candidates for federal office, and of expenditures made by candidates or in their support, violate the First Amendment, either on the face of the statute or as its operation can now be projected?

3. Do requirements for the detailed reporting and disclosure of all contributions received and expenditures made in campaigns for election to federal office violate the First Amendment, either on the face of the statute or as its operation can now be projected?

4. Does the appropriation and expenditure of federal funds in the form of grants to defray the campaign expenses of candidates for the office of President of the United States violate the First or Fifth Amendment, either on the face of the statute or as its operation can now be projected, where the grant to each candidate in the primary elections is to match the sum he raises from private contributions of $250 or less and the grant to candidates in the general election is limited to $20,000,000 for each of the major-party candidates with a ban against further expenditures, with grants to minor-party and new-party candidates according to formulas reflecting their probable importance without limiting their right to seek private contributions and thus make expenditures up to a total of $20,000,000?

5. Is the establishment of a Federal Election Commission with a variety of investigative, interpretative, rule-making and enforcement powers or the conduct of any FEC business to be declared unconstitutional *in limine* because two of the eight members are the chief clerks of the Senate and the House of Representatives *ex officio*, two are selected by the Speaker of the House, two by the President *pro tempore* of the Senate, and two by the President of the United States, with all six approved by a majority of both Houses of Congress?



## Summary of Argument

### I

The restrictions which the FECA, as amended, puts upon the size of financial contributions and expenditures in campaigns for election to federal office serve high objectives: to preserve the integrity of federal political campaigns and elections, and public confidence therein; to safeguard the honor and integrity of the conduct of government, and public confidence therein; to reduce the financial barriers to the candidacies of men and women without access to large contributors of money or their own personal wealth; and to equalize access to candidates and government officials as among wealthy contributors and other citizens. Judged in the light of these pressing interests, the restrictions are well within the power of the Congress and the President to make into law without offending constitutional limitations.

A. Congress has ample power to legislate for these objectives, not only by virtue of Article I, Section 4 of the Constitution but in the exercise of an inherent power to preserve the general government against destruction by corruption.

B. The restrictions are consistent with the First Amendment. The substance of political debate is left untouched. There is no attempt to censor, directly or indirectly, either the ideas that may be expressed or the vehicles chosen for their expression. The restrictions deal only with conduct, with the transfer or use of money and other material resources. The distinction has critical importance despite the likelihood that the restrictions upon the use of money may, in some cases, limit the volume of communication with the voters through the mass media — an important form of speech protected by the First Amendment.

A law which restricts the kinds of ideas, information or feelings which may be expressed or the verbal or pictorial vehicles of expression, or which discriminates among persons who may express them, can be justified — if at all — only in terms of the dangers posed by the ideas or their expression. The constitutional test is exceedingly stringent in such cases, because such censorship not only suppresses information essential to self-government; it also carries the seeds of official ideology and dangerous discrimination.

The constitutional standard is less severe when the statute regulates conduct, one of the consequences of which is to enlarge the enjoyment of freedom of expression but which also does public injury unrelated to any effect of the communication facilitated. The injury may require a measure of public control directed to the conduct without regard to the character or consequences of the ideas or their expression. A law which regulates such conduct evenhandedly is constitutional, even though its operation may in practice tend in some degree to curtail practical opportunities for gaining the maximum benefit of First Amendment freedoms, if the public interests which the measure serves outweigh its costs in curtailment of opportunities for expression.

In the present case, the balance is on the side of constitutionality. The restrictions imposed by Section 608(c) upon aggregate campaign expenditures leave ample opportunity for a candidate to achieve public recognition and lay his case before the electorate even if he begins relatively unknown. Since the statutory ceilings are closely related to the expense of past campaigns, their chief function will be to prevent further rise and cut back wild extravagance. The magnitude and value of the public interests identified at the outset of this Summary show that the justification for any limitation of opportunities to buy



use of media of mass communication which results from the ceilings, is "paramount" or "compelling" in the constitutional sense. These purposes cannot be accomplished by less restrictive measures.

Section 608(e) is particularly assailed because it forbids any person to expend more than $1,000 in any one election to elect a candidate or defeat his opponent, even without consulting the candidate. In its broadest reach, this limitation appears to bar an outlay of more than $1,000 to publicize one's own words. The problem was one of drawing lines. Without Section 608(e), the $1,000 ceiling upon individual contribution and the over-all ceiling upon expenditures by or on behalf of a candidate could easily be circumvented by massive expenditures for campaign advertising and other forms of mass communication made in support of a candidate without any provable communication between the supporter or group of supporters and the candidate or his agents. The same considerations that sustain the constitutionality of the ceiling upon individual contributions sustain Section 608(e) in these instances. Given the need for limiting some kinds of ostensibly independent expenditures, Congress drew the line between truly personal activity, on one side, and spending money, on the other.

The language is tightly drawn so as not to discourage political discussion oriented towards public issues. The restriction applies only to publications "relative to a clearly identified condidate" and only to those "advocating the election or defeat" of that particular person. In Section 591(f), Congress also made certain that Section 608(e) would not interfere with an individual's personal activities in speaking, writing or canvassing for a candidate, or performing other services, without using money to expand the reach of his words. Given these carefully circumscribed limits, we believe that the contribution which

Section 608(e) makes to the workability of the entire plan justifies restricting even the ability of an individual to buy facilities for giving the maximum publicity to his own speech on behalf of a candidate.

This last question is too hypothetical, however, for decision in the present case. Neither pleading nor proof names any person who wishes to make such outlays in order to gain a wider audience for his own words. Any facial attack upon grounds of overbreadth should be rejected upon the ground that the challenged legislation deals with conduct, *i.e.*, spending money, and the overbreadth, if any, is insubstantial judged in relation to Section 608(e)'s plainly legitimate sweep.

B. The ceilings upon individual contributions and candidates' expenditures do not discriminate against any type of candidate or party, either inherently or insofar as their operation can now be projected. The ceilings apply alike to all candidates and financial contributors without regard to party or other form of political sentiment. Neither express language nor euphemism nor disingenuous circumlocution introduces any form of differentiation. The ceilings do not result in any systematic discrimination always favoring incumbents and established parties as a class.

Appellants complain that other laws and facts of political life result in discrimination because incumbent Senators and Representatives enjoy methods of communicating with voters and bringing themselves to public attention which are not available to those who run against them, such as congressional staff, franked mail, office space, and like responsibilities and perquisites of office, including the ability to make news. Insofar as the complaint is that the performance of public duty brings greater public recognition, which may yield returns in a campaign for reelection, the short answer is that the Constitution does not require the government to provide challengers with some offsetting



method of attracting ballots. Insofar as the argument is that the staff and facilities provided to Congressmen are used as campaign facilities which challengers have to purchase, the answers are: (i) that appellants have proved no abuse, general or particular; (ii) that any such discrimination flows not from the FECA but from other laws which should be attacked directly in an appropriate action if there is abuse; and (iii) that no appellant is a victim of the alleged discrimination because none is a challenger to an incumbent or alleges that he wishes to make such a challenge.

Appellants' argument that in practice the ceilings will discriminate against challengers and in favor of incumbents fails for a number of reasons. It rests upon speculation about future events as to which the Court will not substitute its prediction for the judgment of Congress. It deals only with the challenger's supposedly greater need for big spending and omits the probability that in the absence of ceilings, the incumbent may have an advantage in raising contributions, and thus, in making expenditures. The argument asserts only that the ceilings upon the size of financial contributions and a candidate's aggregate expenditures will operate in practice to "discriminate *generally* against challengers and *generally* in favor of incumbents" (Br. p. 94, emphasis added). One cannot make a case of unconstitutional discrimination by this kind of statistical averaging and prediction. Most important, the constitutional ideal of equality does not require the government to allow the otherwise weaker candidate to spend the most money in order to offset his deficiencies. Because public recognition pretty regularly accompanies incumbency, a challenger must be allowed generous opportunity to present himself to the public. The statutory ceilings are more than ample for that purpose. Once that purpose is served, equality in the constitutional sense is achieved by

treating the rivals exactly alike in the segment of their activities to which the law applies, while leaving them where they were in every other aspect of their appeal to the electorate.

## II

The FECA requirements for detailed record-keeping, reporting and disclosure of virtually all campaign contributions and expenditures are constitutional upon their face and insofar as their operation is projected by this record.

The requirements serve three purposes: (i) to provide voters with relevant information; (ii) to guard against the use of money for corrupt or dishonorable purposes; and (iii) to deter violation and facilitate enforcement of the ceilings on contributions and expenditures.

These purposes are of compelling importance in the case of minor as well as major parties. They would amply justify such slight discouragement of the exercise of freedom of association as may be expected to flow from them because a few persons prefer to keep private the fact or extent of their gifts of money for political purposes. There is no evidence that any appellant or other contributor risks subjection to substantial public reprisals. Such speculative hazards as appellants articulate are "too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest." *United States* v. *Harriss*, 347 U.S. 612, 626 (1954).

This case does not raise the question whether the reporting requirements would be constitutional as applied to a political party so unpopular that disclosure of the names of its financial supporters would subject them to risk of widespread public reprisal. Even if unconstitutionality in some applications be assumed, the resulting



overbreadth would not render the disclosure provisions unconstitutional on their face. The direct regulation of speech is not involved and the overbreadth, if any, is insubstantial judged in relation to the statute's plainly legitimate sweep. Moreover, the statute need have no "chilling effect" upon the exercise of First Amendment freedoms in this area because any party faced with such unpopularity would have standing to raise the issue without risking prosecution of either itself or its supporters.

## III

Article I, Section 8 grants Congress power to make appropriations "for the general welfare." Providing adequate public financing by which candidates for election as President of the United States may present themselves and their views to the electorate serves such a purpose. The related restrictions upon expenditures, especially the $20,000,000 ceiling upon the aggregate expenditures of any candidate (18 U.S.C. § 608(c)), is within the legislative power of Congress for reasons previously discussed.

Even-handed public financing of the cost of election campaigns is consistent with both the words and spirit of the First Amendment. The financial support, viewed as a whole, goes not to any particular candidate, or party, or political opinion, but to promote the process of public deliberation prior to balloting. Where the Establishment Clause and history conjoin to teach that the government shall not promote religion, because the domain of religion should be set aside as a garden in the wilderness, neither the text of the guaranty respecting speech nor historic experience denies the public the means of providing for that fullness of political debate necessary to the preservation of representative government.

Appellants complain of unconstitutional discrimination

because in general Presidential elections the public financial aid available to the candidates of minor parties and new parties is less than the subvention available to the candidates of major parties, *i.e.*, those whose candidates received more than 25 percent of the vote in the previous election. "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness* v. *Fortson*, 403 U.S. 431, 441-42 (1971). Congress was not required to ignore the manifold greater significance of major parties in terms of their ability both to win elections and to raise campaign funds. No presidential candidate nominated by a minor party or new party has ever been elected. Minor party and new party candidates have not come close for sixty years. The formulas for allocating aid provide equal treatment to all candidates and groups in relation to their electoral needs and potential.

Indeed, when the grants of financial support and the restrictions upon expenditures are taken as a whole, there is every reason to believe that the FECA, as amended, will improve the relative financial position of the Presidential candidates of minor parties and new parties. Under FECA a major party candidate receives $20,000,000 *in substitution* for the ability to raise and spend several times that sum. The minor party candidate receives a payment proportionate to its probable significance measured by the electoral vote in the last election *plus* the sums which it can raise and spend from private sources *plus* the guaranty of a further sum after the election, if deserved, in order to make its subsidy proportionate to its actual electoral significance. When this package of financial opportunities is compared with the $20,000,000 to which the major party candidates are limited, it seems highly probable that any minor party candidate will be relatively better off financially than in the absence of



legislation. New parties receive no advance public subvention, but the ceiling upon expenditures should improve their relative position. Any slight risk that a minor or new party candidate will lose financial power relative to a major party because of some unforeseen circumstance is justified by the interest in avoiding wasteful public expenditures serving chiefly to promote frivolous candidacies, splintered parties or unrestrained factionalism.

The FECA, as amended, also enlarges the opportunity to seek nomination for election to the Presidency despite lack of wealth or access to wealth by providing matching grants for candidates who show that they have received contributions aggregating at least $5,000 from the residents of each of 20 States, counting only the first $250 of each contribution. The eligibility requirements are designed to confine the federal subsidy to those candidates who have such serious support of their own as to give them a significant chance of winning nomination. The matching payments do not wipe out but plainly tend to reduce inequalities of opportunity due to differences in ability to raise large contributions. The imaginary candidate with popular support but no ability to raise funds is unlikely to find himself worse off than before. At worst, he loses only some marginal chance that he might have won the nomination instead of the candidate whose success is attributable to funds which that candidate would not have had without the public subvention. A reform measure that moves strongly in the direction of eliminating the consequences of economic disparities is not unconstitutional merely because some of life's unfairnesses remain unchanged.

## IV

The court below correctly ruled that the Federal Election Commission was lawfully established and its members constitutionally appointed, without deciding whether the FECA provisions purporting to give the Commission power to institute civil actions and recommend criminal prosecution are unconstitutional invasions of Executive prerogatives. The Commission has a core of other important powers of kinds which do not belong exclusively to the Executive and which have often been vested in agencies deliberately put beyond executive control. The Commission's duties to conduct studies and recommend legislation, to conduct audits and make certifications in connection with public financing of federal elections, to serve as a depositary of financial reports, and to issue interpretative opinions and rules and regulations implementing the FECA are all functions which may constitutionally be assigned to an independent agency.

The Federal Elections Commission was designed to be, and is, an agency independent of both Congress and the President in the performance of the bulk of its duties. There were unique reasons not only for that choice but more especially for the dividing the selection of the six voting members among the President of the United States, the Speaker of the House of Representatives, and the President *pro tem.* of the Senate. The incumbent President would soon be seeking nomination and election. He would be leading his Party in the 1976 campaigns for Senator and Representative. The six new commissioners would be rendering interpretations of a new law which might well be thought to injure one major party and assist the other. The six members to be appointed might soon be required to certify whether the incumbent President was entitled to matching funds under 26 U.S.C. §§ 9033-9036 in seeking



nomination, and later, to determine whether his Party and he, himself, were eligible for payments under 26 U.S.C. §§ 9003-9005, 9008. It would be their duty to make careful audits of his accounts and obtain repayment if found due. It would also be their duty to receive other reports from him as a candidate, to determine how to publish them, and to scrutinize them for violations. No argument is needed to show the unsoundness of providing that all six men should be selected by the chief political figure with whom they must deal and whose behavior they must scrutinize. Dividing the authority to appoint the six voting members of the Commission among three high ranking officials, including the President of the United States, was calculated to remove the Commission from any single source of influence, and to guard against any single set of mind. Still further assistance is contained in the requirement that the President *pro tem.* of the Senate and the Speaker of the House appoint "upon the recommendations of the majority leader . . . and the minority leader . . . ."

Nothing in the words of Article II or the theory of the separation of powers bars this solution to a new and unique problem. The sum of legislative and executive practice, and of the rare judicial rulings, is that the President, generally speaking, exercises both the power to appoint and to remove, but that deviations from the principle, including virtual appointment by Congress, will be permitted when special occasion requires.

The Federal Elections Commission will occupy a unique role in our politics and government. It can succeed only if its complete independence and freedom from bias or predilection is trusted by both rival candidates and citizenry. Dividing the power of appointment so that no more than two of six members would ever owe their position to a single source is an important step in enabling the Commission to build that essential trust.

## Argument

### *Introduction*

For government of the people to survive public office must be kept a public trust. Corrosion of the honor and integrity of official decisions will destroy representative government more surely than conquest by force. Alienation of the citizenry from the political system because it sees the system losing integrity is a final phase of the fall.

In the United States, in our time, these dangers are neither hypothetical nor remote. Through the 1960's and into the 1970's ever-more staggering sums of money were being spent in each new federal election campaign, as candidates either sought to win by big spending or, despite their distaste, feared to let their rivals outspend them. The need for enormous sums of money sent candidates "where the money is," seeking ever larger individual and concealed-corporate contributions. Often the big contributions came from those whose business interests would be directly affected by government decisions, for the expansion of government regulation and spending has brought more business interests within the impact of day-to-day governmental action. Decisions favoring those interests then flowed from officials subject to pressure from the successful candidates or political party which had received such largesse. Cause and effect? The relation is seldom clear. But other businessmen were feeling pressure to match the contributions of their competitors. Citizens who observed the course of events, especially young men and women into whose hands the Republic would soon be committed, were alienated by the evidence that the world of politics and government served chiefly the "big money" which brought political success.



Congress faced the danger squarely, with evident appreciation of the weight of its responsibility. The debate was full; the deliberations, mature. Congressional concern with the improper influence of large financial contributions goes back to early in the present century. See *United States* v. *UAW*, 352 U.S. 567, 570-84 (1957). Congressional deliberations leading to the challenged legislation began in 1966 and proceeded at a high level of interest for eight years. During this period three major laws were enacted and later revised. Presidential Election Campaign Fund Act, P.L. 89-908, 80 Stat. 1587 (1966); Federal Election Campaign Act of 1971, P.L. 92-225, 86 Stat. 3 (1972); Subtitle H of the Internal Revenue Code, P.L. 92-178, 85 Stat. 562 (1971); and Federal Election Campaign Act Amendments of 1974, P.L. 93-443, 88 Stat. 1263 (1975). There were elaborate hearings: *Hearings Before the Subcommittee on Elections of the Committee on House Administration on the Federal Election Laws,* 89th Cong., 2d Sess. (1966); *Hearings Before the Senate Committee on Finance on Various Proposals for Financing Political Campaigns,* 90th Cong., 1st Sess. (1967); *Hearings Before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration on Bills Proposing Amendments to and Improvements in the Federal Election Laws,* 90th Cong., 1st Sess. (1967); *Hearings Before the Subcommittee on Elections of the House Committee on Administration on H.R. 8284 to Limit Campaign Expenditures by or on Behalf of Candidates for Federal Elective Office and For Other Purposes,* 92d Cong., 1st Sess. (1971); *Hearings Before the Subcommittee on Elections of the House Committee on Administration on H.R. 7612 to Improve the Conduct and Regulation of Federal Election Campaign Activities and to Provide Public Financing for Such Campaigns,* 93d Cong., 1st Sess. (1973). When Congress revisited the en-

tire subject in 1973 and 1974 after observing the operation of earlier laws in the 1972 elections, there were three careful Senate reports, two reports made by the Committee on Rules and Administration (S. Reps. 93-310, 93-689) and one by the Committee on Commerce (S. Rep. 93-170). An elaborate report was also filed by the House Committee on Administration (H.R. Rep. 93-1239). There was protracted debate in both chambers and an elaborate Conference Report (S. Rep. 93-1237). Thus, "[t]he bill . . . did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law . . . . It would require no ordinary share of intrepidity to assert, that a measure adopted under these circumstances, was a bold and plain usurpation, to which the constitution gave no countenance." *McCulloch* v. *Maryland*, 4 Wheat. 316, 402 (1819).

The remedies provided by Congress in the Federal Election Campaign Act, as amended, regulate the financing — and only the financing — of political campaigns for election to federal office. Many provisions are long and complex, partly because experience demonstrated the dangers of evasion and avoidance, but partly because concern for political liberty required Congress to resolve questions of degree with all the precision that language permits. The five central themes are simple and direct:

(1) The size of individual and organizational contributions is limited.

(2) Ceilings are placed upon the aggregate of expenditures a candidate may make in seeking elective federal office.



(3) Detailed reporting and disclosure is required for contributions and expenditures within the statutory limits.

(4) Public financing is provided in Presidential elections for candidates with substantial public support.

(5) A strong, independent and permanent commission is established to implement these measures and investigate the need for further electoral reform.

The basic issues in this case are framed by appellants' contention that Congress has no power to prescribe any of these remedies for the evils corroding our national political life. The thrust of their argument is that Congress may do *nothing* to limit the size of candidates' financial expenditures, *nothing* to limit the size of the gifts of money which candidates may accept, *nothing* to require disclosing the names of contributors to any but Democratic and Republican candidates, and *nothing* to substitute public financing for reliance upon the private contributions which are the source of such grave danger.

We believe that the Congress is not so impotent in dealing with a national crisis. The remedial measures adopted are within the basic legislative powers of Congress and fully consistent with the words and underlying values of the First Amendment. The substance of political debate is left untouched. The restrictions upon contributions and expenditures, and also the requirements of disclosure, deal not with speakers or ideas but with conduct — with the giving and spending of money and like financial resources. Indirectly they will probably check further increases, and may somewhat reduce, the amounts of money available to hire media of mass communication, but those consequences, even though enough to implicate the First Amendment, are amply justified by the Act's contribution

to the openness and integrity of the political system. The plan for public financing in campaigns for nomination and elections as President serves the same high purposes. The appropriations promote general public debate upon candidates and issues without favoring any candidate, political party or ideology. Minor parties and new parties will have relatively greater spending power *vis a vis* the major parties as a result of the total package of restrictions and payments from the Presidential Election Campaign Fund.

The fundamental issues concerning whether Congress has power to restrict the size of contributions and expenditures, or to require any disclosure of the identity of any contributors, or to provide public financing in any circumstances are properly before the Court because they go to the facial validity of a statute touching immediately upon the interests of one or more appellants. Appellants have also identified, concretely and with particularity, some activities in which they would engage, or others would engage for their benefit, but for the statutory prohibitions. The constitutionality of the Act as applied in these concrete instances is also properly before the Court. FECA Section 315(a), codified as 2 U.S.C. § 437h, supplies an expedited procedure and eliminates any question concerning appellants' standing to challenge the public financing of costs of political campaigns. See *Flast* v. *Cohen,* 392 U.S. 83, 120 (1968) (dissenting opinion).

Appellants also present many purely hypothetical questions, which have not taken shape and may never arise. In our view, Section 315(a) does not authorize decision of such questions. Such a mandate would be an unconstitutional effort to enlarge the Court's jurisdiction beyond the "cases" and "controversies" to which the judicial power under Article III is confined. "Passing upon the



possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case." *Watson* v. *Buck,* 313 U.S. 387, 402 (1941).

We discuss these limitations upon the scope of the questions before the Court at greater length in the appropriate substantive context. It is enough preliminarily to note three points:

First, the only constitutional questions to be decided in this case are whether any challenged FECA provision is unconstitutional on its face or as applied to a live controversy growing out of a concrete situation presented by appellants' factual allegations or proof.

Second, the constitutional questions properly before the Court are not to be decided for all time regardless of major changes in social, economic, or political conditions. An Act of Congress which is constitutional under one set of conditions may be held invalid upon sufficient demonstration that conditions have critically changed. *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543 (1924); *Milnot Co.* v. *Richardson,* 350 F. Supp. 221 (S.D. Ill. 1972).

Third, arguments charging unconstitutional vagueness because of borderline questions of interpretation should carry little weight in this case. No one need refrain from any lawful activity or trim his words because of uncertainty concerning the meaning of the Act. The Act requires the Federal Elections Commission to give anyone considering a specific course of conduct an advisory opinion in writing. If he relies upon the opinion in good faith, he is not guilty of a criminal offense. 2 U.S.C. § 437f.

## I

THE RESTRICTIONS UPON THE SIZE OF FINANCIAL CONTRIBUTIONS TO CANDIDATES FOR FEDERAL OFFICE AND UPON EXPENDITURES BY THEM OR IN THEIR SUPPORT ARE CONSTITUTIONAL ON THEIR FACE AND INSOFAR AS THEIR OPERATION CAN BE PROJECTED UPON THIS RECORD.

### A. *Congress Is Empowered to Legislate Concerning Financial Contributions and Expenditures in Federal Elections.*

Congress has full power to enact legislation for preserving the integrity of federal elections. In the case of Senators and Representatives, the power is expressly delegated by Article I, Section 4. *Ex parte Siebold,* 100 U.S. 371 (1879); *United States* v. *Mosley,* 238 U.S. 383 (1915); *United States* v. *Classic,* 313 U.S. 299 (1941). In the election of the President, the power is inherent. *Ex parte Yarbrough,* 110 U.S. 651 (1884); *Burroughs* v. *United States,* 290 U.S. 534 (1934). In the latter case the Court declared:

> To say that Congress is without power to pass appropriate legislation to safeguard such an election [*i.e.* a Presidential election] from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption. *Id.* at 545.



Congress is also authorized to enact legislation securing the conduct of government against financial corruption and other forms of improper influence. The Court recognized the existence of this power in the passage just quoted from *Burroughs.* It has consistently sustained such legislation, including restrictions upon the political activities of civil servants, *Ex parte Curtis,* 106 U.S. 371 (1882); *United States* v. *Wurzbach,* 280 U.S. 396 (1930); *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947); *Civil Service Commission* v. *Letter Carriers Union,* 413 U.S. 548 (1973), registration of lobbyists, *United States* v. *Harriss,* 347 U.S. 612, 625 (1954), the punishment of bribery and conflicts of interest, *Burton* v. *United States,* 202 U.S. 344 (1906); *United States* v. *Brewster,* 408 U.S. 501 (1972), and the punishment of conspiracies "for impairing, obstructing or defeating the lawful function of any department of Government," *Haas* v. *Henkel,* 216 U.S. 462, 479 (1910). See also *In re Coy,* 127 U.S. 731 (1888).

The legislation here challenged is within the ambit of the delegated powers. Its objects are to preserve the integrity of federal political campaigns and elections, and public confidence therein; to safeguard the honor and integrity of the conduct of government, and public confidence therein; to prevent the violation or circumvention of earlier laws regulating financial abuses in election campaigns; to reduce the actual and apparent influence of vast financial resources on the outcome of elections; to reduce the financial barriers to the candidacies of men and women without access to large contributors of money or their own personal wealth; and to equalize access to candidates and government officials as among wealthy contributors and other citizens.

The power to legislate for these objectives being clear, the choice among means reasonably related to the ends is for Congress, subject only to inquiry whether the means

selected violate a guaranty of liberty in the First or Fifth Amendment. Cf. *Burroughs* v. *United States*, 290 U.S. 534, 547 (1934).

B. *The Ceilings Upon Contributions and Expenditures Are Consistent With the First Amendment, as Enacted and as Applied to Any Situation Ripe for Adjudication.*

The restrictions upon the size of campaign contributions and expenditures do not deny anyone the right to speak or to associate himself with others. The Act does not prohibit, punish, or attach liability to any form of utterance, publication or communication as such. The substance of political debate is left untouched. There is no attempt to censor, directly or indirectly, either the ideas that may be expressed or the vehicles chosen for their expression. Moreover, this statute, unlike the law under attack in *United States* v. *CIO*, 335 U.S. 106 (1948), and *United States* v. *UAW*, 352 U.S. 567 (1957), does not discriminate among individuals or organized groups in opportunities to express their political concerns. The restrictions here at issue deal only with conduct, with the transfer or use of money and other material resources. Appellants' argument ignores this simple truth.

The restrictions upon conduct will undoubtedly have some practical effects upon opportunities for enjoying some forms of freedom of political expression and for increasing the effectiveness of political associations. In modern society money gives access to the channels of mass communication: radio and television broadcasts, newspaper advertisements, direct mailing, and other media of expression. If a particular candidate has the capacity to raise and spend such large sums of money as to exceed the ceiling upon campaign expenditures, then the ceilings



will probably limit the number of people reached by his speeches, advertising and slogans, and also the frequency with which his name, virtues and views are brought to public attention. The ceilings upon individual financial contributions[1] may have similar consequences, either because the candidate cannot raise the full amount he is allowed to spend without obtaining some gifts exceeding the ceilings, or because larger contributions are needed to buy the means of mass communication at the time when they will be most effective. The restrictions upon individual expenditures on behalf of a candidate[2] and upon a candidate's expenditures from personal or family funds[3] may have similar consequences.

Although the indirect effects of the ceilings upon opportunities to buy use of the media of mass communication are enough to require consideration of the bearing of the First Amendment, the distinction between regulation of the use of money and regulation of speech itself has critical constitutional importance. The reasons are these:

A law which restricts the kinds of ideas, information or feelings which may be expressed,[4] or the verbal or pictorial vehicles of expression,[5] or which discriminates among persons who may express them,[6] can be justified — if at all — only by showing either the existence of some overwhelming public exigency[7] or the utter worthlessness of the mes-

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[1] §§608(b)(1) and (3).
[2] §608(e).
[3] §608(a).
[4] *E.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964); New York Times Co. v. United States, 403 U.S. 713 (1971).
[5] *E.g.*, Cohen v. California, 403 U.S. 15 (1971); Spence v. Washington, 418 U.S. 405 (1974).
[6] *E.g.*, United States v. UAW, 352 U.S. 567 (1957).
[7] *E.g.*, New York Times Co. v. United States, 403 U.S. 713, 726, 730, 731 (1971). In a few instances the restriction is limited to the circumstances of a particular time and place but based upon the dangerous character of the ideas expressed. *E.g.*, Brandenberg v. Ohio, 395 U.S. 444 (1969). In such cases the justifying public

sage.[8] When the government attempts to deal with speech directly, the case for regulation must be made—if it can be made at all—in terms of the danger posed by the ideas. The constitutional test is exceedingly stringent in such cases, if indeed the First Amendment ever permits such regulation in a medium of unrestricted access. Such censorship offends the individual's duty to voice the truth he has discovered;[9] it may deprive the people of information essential to self-government; it also carries the danger of discrimination and the seeds of official ideology.

A generalized regulation of conduct, not tied to any particular ideas, speakers or forms of expression, carries none of these dangers. Conduct, even when one of its consequences is to facilitate the exercise of freedom of speech or of the press, may work public injury unrelated to any effect of the communication facilitated. The injury may require a measure of public control directed to the conduct without regard to the character of the ideas or their expression. Here, the constitutional standard is less severe. A law which regulates conduct evenhandedly is constitutional, even though its operation may in practice curtail the maximum use of First Amendment freedoms, if the public interests which the measure is really calculated to serve outweigh its costs in curtailment of the volume of expression. Similarly, a narrowly-drawn restriction upon time, place or channel of expression is constitutional if justified by opposing public interests invaded by any act of speaking or any resort to a particular form of expression at the particular time or place, without reference to the ideas expressed or the identity of the one expressing them. The accepted test of constitutionality in all such cases is to inquire whether the regulation serves a "compelling" or "paramount" public interest which cannot be secured equally well by another, less restrictive measure. *Branzburg* v. *Hayes,* 408 U.S. 665, 682, 733-34 (1972); *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968).[10]

necessity need not be as overwhelming as total suppression of a piece of information would require, but because the proscription turns upon the particular words and their consequences the test is more stringent than would otherwise be required.

[8] *E.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964); Miller v. California, 413 U.S. 15, 23-24 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 54 (1973).

[9] *Cf.* Hocking, Freedom of the Press 96-97 (1947).



[10] A wealth of precedent supports the principles stated in the text.

*Non-discriminatory taxation or regulation which, by increasing costs or otherwise hampering business methods, may reduce opportunities for publication:* Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937); Associated Press v. United States, 326 U.S. 1 (1945); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192-93 (1946); Breard v. City of Alexandria, 341 U.S. 622 (1951).

*Symbolic conduct:* United States v. O'Brien, 391 U.S. 367 (1968).

*Expressive conduct carrying economic consequences:* Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Teamsters Union v. Vogt, Inc., 354 U.S. 284 (1957).

*Regulation of time, place or manner of expression:* Kovacs v. Cooper, 336 U.S. 77 (1949); Cameron v. Johnson, 390 U.S. 611 (1968); Cox v. Louisiana, 379 U.S. 559 (1965); Adderley v. Florida, 385 U.S. 39 (1966); Grayned v. City of Rockford, 408 U.S. 104 (1972).

*Restraints upon political activities:* United Public Workers v. Mitchell, 330 U.S. 75 (1947); Civil Service Commission v. Letter Carriers Union, 413 U.S. 548 (1973); Broadrick v. Oklahoma, 413 U.S. 601 (1973).

*Other restraints upon freedom of association:* Gibson v. Florida Leg. Inv. Comm., 372 U.S. 539 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

Cases dealing with speeches advocating overthrow of the government by force or similar violence are especially instructive. The present rule appears to be that advocacy of the use of force or law violation is punishable only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). The requirement of "imminent" lawless action limits the proscription in time and place, but because the only harm is the consequence of the particular ideas which the speaker wishes to express, the limitation must pass a more stringent test than would otherwise be appropriate. Mills v. Alabama, 384 U.S. 214 (1966), was such a case even though the prohibition against newspaper editors attacking or favoring a candidate or ballot proposition

The Attorney General (Br. pp. 27-28, 59-61) confuses the issue by suggesting that in order to uphold the constitutionality of the FECA, as amended, one must look to precedents sustaining regulatory measures addressed to the content of speech. E.g., *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); *Civil Service Commission* v. *Letter Carriers Union*, 413 U.S. 548 (1973). Compare *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). In each of those cases the challenge was to a law drawn upon the theory that certain ideas would have undesirable consequences if expressed at a particular time or place, or if not followed by opportunity for rebuttal. The constitutional test was very stringent because the law was concerned with what was said and was enacted because of its allegedly undesirable consequences. Similarly, in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the complaint charged the illegality of the substance of the truckers' publicity campaign, an allegation central to the railroads' case. The present case is altogether different. The FECA, as amended, is not concerned with what is said, how often it is said, or who speaks, except in the very marginal case where Section 608(e) calls for looking to the words to ascertain whether they relate to a clearly identified candidate and urge his election or defeat. The evils which Congress addressed are the corrosive influence of large contributions and expenditures of money — dangers in nowise resulting from the ideas expressed or the volume of

was limited to the day of an election. The statute treated the expression of certain ideas as contrary to the public interest; it was concerned with the character of the words and not with conduct and consequently failed to pass the very stringent constitutional test. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), also involved regulation based upon the ideas expressed. The regulation was upheld because of technological limits upon access to the electronic medium.



expression. For this reason, the cases above which sustain First Amendment claims are readily distinguishable, and the Court can—and we submit should—sustain the constitutionality of the limits upon contributions and expenditures without drawing upon such cases as sustain regulation of speech. The instant case requires no expression of opinion upon whether the Court would uphold the use of a balancing test or upon what test the Court would apply where particular ideas are singled out for regulation.

Appellants (Br. p. 47) likewise blur the critical distinction when they argue that under our view "a limitation on how much newspapers spend on publication — to hire reporters, investigate stories, and print editions — would not be a regulation of the newspaper itself." We make no such contention. Such a limitation would violate the First Amendment if the restriction rested upon a legislative notion that the evil to be remedied is the size of each edition, the volume of news coverage, the number of readers, the amount of influence the newspaper exerts, or any other consequence either of what is published or of the breadth of circulation. Cf. *Grosjean* v. *American Press. Co.*, 297 U.S. 233 (1936). On the other hand, the First Amendment would not prevent limiting expenditures which were the source of some substantial injury to an important public interest without regard to what information, ideas, or arguments the publisher chose to print. During wartime shortage, for example, Congress could place valid limits on expenditures for newsprint, even though the consequence was to curtail the circulation, the number of editions or the size of the paper. Similarly, if a publisher were to pour money into a newspaper with a view to a temporary reduction in price and increase in circulation which would destroy competitors and yield a future monopoly, the First Amendment would not be a defense to prosecution under the Sherman Act. Cf. *Associated Press*

v. *United States,* 326 U.S. 1 (1945); *Lorain Journal Co.* v. *United States,* 342 U.S. 143 (1951).

Thus, the opposing arguments cast no doubt upon the proposition that a law which regulates conduct even-handedly, because of the injury which that conduct does to the public interest, is constitutional if the public interests which the measure is really calculated to serve outweigh the costs in curtailment of opportunities for the full enjoyment of freedom of expression. Nor do they show that the question, insofar as it can be reduced to words, is not whether the regulation serves a "paramount" or "compelling" public purpose.

We make this submission in full awareness that the volume of political debate, the size of a candidate's audiences and the frequency with which they are reached may be substantially affected by the amounts of money that he is allowed to raise and spend for campaign purposes. The link does not require a more stringent constitutional test. The "compelling interest" test or some essentially similar formulation has been applied when the link was very much closer than here. In *United States* v. *O'Brien,* 391 U.S. 367 (1968), the act of tearing up a Selective Service card was itself the means of expression; no other means, in the speaker's judgment, would have spoken so dramatically to so many people. Similarly, in *Kovacs* v. *Cooper,* 336 U.S. 77 (1949), use of a raucus sound truck bore a direct relation to the size of the circle of auditors. Restrictions upon the time and place of speaking may also have important effect upon the attention a speech or demonstration can attract through the mass media. E.g., *Adderley* v. *Florida,* 385 U.S. 39 (1966). Balancing was permitted in those cases, despite the direct connection between the prohibited conduct and the effective use of speech, because each law focussed upon the evils flowing from the conduct, just as the FECA, as amended,



focusses upon the evil consequences of private political financing in the absence of ceilings upon the size of contributions and expenditures.

The extent to which a regulation of conduct curtails practical opportunities for the enjoyment of freedom of expression is one prime element in the constitutional equation. The other two are the weight of the public interests served by the measure and the availability of less restrictive measures. Accordingly, we turn to each of the elements successively in order to show that in the present case the balance requires the conclusion that the ceilings on contributions and expenditures are constitutional, not only on the face of the statute but as applied to any concrete situation presented by the record.

1. *The Ceilings upon Campaign Contributions and Expenditures Leave Generous Opportunities for Political Activity, Including the Exercise of Freedom of Speech.*

The restrictions imposed by Section 608(c) upon a candidate's aggregate expenditures leave ample opportunity to achieve public recognition and lay his case before the electorate even if he begins relatively unknown. For the statutory ceilings are so closely related to the expense of past campaigns as to demonstrate that their chief functions will be to prevent further rise and cut back wild extravagance.

In both 1972 and 1974 slightly over 97 percent of the election campaigns for Representative were conducted by major party candidates at less cost than the FECA expenditure ceiling. Less than 3 percent of the major party candidates in House races reported total expenditures exceeding the combined primary and general election ceil-

ings.[11] Findings IIA, ¶¶18, 40,[12] II J.A. 442, 448. In 1972, both Congressional candidates exceeded the spending limit in only 4 of 380 contested elections. Finding IIA, ¶3, II J.A. 269. In 1974, both candidates exceeded the limit in only one contest. Finding IIA, ¶5, II J.A. 326.

Spending was somewhat heavier in 1972 and 1974 election campaigns for Senator, but 75 percent of the candidates in each year spent less than the present FECA combined expenditure ceiling. Sixteen of those who spent more than the present ceiling were incumbents. Six were challengers to incumbents, four of whom were outspent by their incumbent opponents, and 13 were candidates in open races. Findings IIA, ¶¶28, 47, II J.A. 445, 450.[13]

Spending in past Presidential elections also indicates the reasonableness of those ceilings. In 1968 the Republican candidate raised and could have spent $29,600,000; the Democratic candidate, $13,600,000. 1969 Congressional Quarterly Almanac 1200. The $20,000,000 limit fixed by Section 608(c), plus the two cents per potential voter allowed national committees (§608(f)(2) ), will set a ceiling of approximately $22,400,000. which is little above the average of the two. Comparison with 1972 is more difficult because there is no reliable way of breaking down the total figures for the primary and general election campaigns.

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[11] 1972 and 1974 Congressional and Senatorial candidates were required to report their campaign expenditures under the 1971 FECA. Primary expenditures were not then segregated from general election expenditures and it is not possible to make that separation now with reasonable accuracy. Therefore, we have compared total expenditures in those years with the combined FECA limits for primary and general elections.

[12] Only one of 439 minor party candidates in 1972 and 1974 House races exceeded the combined spending limit. That candidate, Allard Lowenstein of New York, first ran in the Democratic party primary, then ran in a court-ordered second primary, and after losing, ran as a Liberal in the general election. Findings IIA, ¶19, 40-41, II J.A. 448-49.

[13] No minor party candidate for Senate exceeded his State's limit in 1972 or 1974.



President Nixon reported spending $55,200,000. Senator McGovern reported $38,200,000. Under the FECA ceilings total spending of $36,200,000, including 20 percent for fundraising, would be permissible, in seeking nomination and election.

The relation between past experience and the present ceilings upon a candidate's aggregate expenditures is more than sufficient to show that the ceilings allow generous scope for purchasing facilities of mass communication more than ample for very wide political debate and publicity. Appellants have made no showing which undercuts the connection. The fact that there was heavier spending in a small number of closely contested elections shows only that candidates chose to spend all they could raise, not that such sums were necessary to full debate and publicity.

The effect of the $1,000 limit on individual contributions is more difficult to predict, but it is also much less directly linked to the total volume of political activity. The scattered evidence available tends to indicate that candidates will continue to raise sums sufficient for wide and vigorous campaigning. For example, preliminary reports of expenditures in the recent special election of a Senator from New Hampshire indicate that both candidates raised and spent very close to the statutory limit.

It is also worth noting that the link between contributions and expenditures, on the one hand, and the volume of campaign debate, on the other hand, may be looser than appellants ask the Court to suppose. The $1,000 limit on individual contributions and other ceilings upon separate gifts or expenditures obviously do not directly control the sums spent upon the media, although they will influence methods of political finance. The ceiling upon a candidate's aggregate expenditures may exert greater influence, but even that restriction leaves room for adjusting

campaign practices so as to reduce expenditures in areas other than travel and hiring media of mass communication. Less money might be spent in taking polls, for example. Candidates might choose to spend less on hiring advertising agencies and public relations men to "package the product," and rely more heavily upon volunteers. A candidate might even write some of his own speeches instead of paying the salary of a professional. More effort may go into organizing volunteers and activities, less into advertising candidates like soap and cigarettes. None of this to suggest that it is a function of FECA, as amended, to induce such changes; nor do we argue that they would be good or bad. Under the First Amendment it is not for government to judge the relative values of various forms of political debate. The point we urge is that the opportunities for changing campaign practices show that there is no fixed, one-for-one relationship between ceilings upon individual contributions and aggregate expenditures and the extent to which candidates and their supporters can enjoy the exercise of First Amendment rights.

For both reasons, we conclude that the ceilings upon contributions and expenditures allow every candidate very generous opportunity to use all facilities of mass communication in enjoying both freedom of political activity and freedom of speech.

2. *The Ceilings upon Contributions and Expenditures Promote Compelling Public Interests.*

A primary function of the ceilings on financial contributions and expenditures in political campaigns for election to federal office is to secure against the influence of money the honor and integrity of decisions in both the Legislative and Executive Branch.

Expenditures in election campaigns had been growing by



leaps and bounds.[14] The staggering cost increased the pressure to accept, and even to extort, very large gifts from men whose personal ambitions or business affairs would

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[14] The dramatic increase in expenditures in federal election campaigns is illustrated by the following charts.

PRESIDENTIAL CAMPAIGN EXPENDITURES

| YEAR | Total Expenditures[a] (current dollars)[b] (in millions of $) | CPI[c] (1967 = base)[d] | Total Expenditures (1967 dollars)[e] (in millions of $) | Expenditure Index[f] (1952 = base)[d] (adjusted for inflation) |
|---|---|---|---|---|
| 1952 | 11.6 | 79.5 | 14.6 | 100.0 |
| 1956 | 12.9 | 81.4 | 15.8 | 108.2 |
| 1960 | 19.9 | 88.7 | 22.4 | 153.4 |
| 1964 | 24.8 | 92.9 | 26.7 | 182.9 |
| 1968 | 44.2 | 104.2 | 42.4 | 290.0 |
| 1972 | 83.0 | 125.3 | 66.2 | 453.4 |

CONGRESSIONAL CAMPAIGN EXPENDITURES

| YEAR | % increase from previous election yr.[g] | Expenditure Index[h] (1962 = base)[d] | CPI[c] (1967 = base)[d] | Expenditure Index[f] (1962 = base)[d] (adjusted for inflation) |
|---|---|---|---|---|
| 1962 | —— | 100.0 | 90.6 | 100.0 |
| 1964 | +10 | 110.0 | 92.9 | 107.3 |
| 1966 | +36 | 149.6 | 97.2 | 139.4 |
| 1968 | +35 | 202.0 | 104.2 | 175.6 |
| 1970 | +48 | 299.0 | 116.3 | 232.9 |
| 1972 | +57 | 469.4 | 125.3 | 339.4 |
| 1974 | +11 | 521.0 | 144.0[i] | 327.8 |

[a] Finding I, ¶12, II J.A. 10. This column includes all direct campaign expenditures by national level Presidential and Party Committees for all Presidential nominees in the general election.
[b] "Current dollars" signifies that no adjustment for inflation has been made.
[c] Consumer Price Index (yearly average figures). Source: 1974 Statistical Abstract of the United States 411 (from U.S. Bureau of Labor Statistics, "Monthly Labor Review").
[d] The base year indicates the year for which the index equals 100.0.
[e] The figures in this column are adjusted for inflation.
[f] The expenditure index lists the campaign expenditures of each year as a percentage of the expenditures in the base year.
[g] Finding I, ¶94, II J.A. 53 (for 1962 through 1970 figures); Finding IIA, ¶34, II J.A. 447 (1972 total Congressional campaign expenditures); Finding IIA, ¶11, II J.A. 441 (1974 total Congressional campaign expenditures). Total Congressional campaign spending in 1970 was $42.4 million, 29 Congressional Quarterly Weekly 1572 (July 23, 1971).
[h] The expenditure index lists the campaign expenditures in each year as a percentage of the expenditures in the base year. The figures are not adjusted for inflation.
[i] Consumer Price Index for April, 1974.

be directly and substantially affected by government decisions which the successful candidate or political party could influence. As the role of money rises, so increases the obligation which the successful candidate or party owes to the large contributors who supply the means of victory. No one seriously denies either the sense of obligation or the pressure to make repayment in some form.[15] The larger the contribution, the greater the pressure to repay.

The kinds of advantage sought by large contributors and the degrees of "bargain and sale" vary over a wide range. A major solicitor of large contributions in 1972 acknowledged that an ambassadorial assignment was sold for a financial gift.[16] More often, perhaps, potentially large contributors wishing to be ambassadors have received only the euphemistic and possibly lawful assurance that after the election their names would be included on the list of "well-qualified" persons which the campaign official had been asked to submit to the appointing authority. In either event, the danger of corrupting influence is plain.

Many potential contributors of large campaign gifts have business interests likely to be affected by decisions of the Congress and federal agencies. The proportion has

[15] Senator Russell Long has stated, "[W]hen you are talking in terms of large campaign contributions . . . the distinction between a campaign contribution and a bribe is almost a hairline difference. . . ." Hearings on S.3496, Amendment No. 732, S.2006, S.2965, and S.3014 Before the Senate Comm. on Finance, 89th Cong., 2d Sess. 78 (1966). Senator Hubert Humphrey observed, "Those of us who run for office can profess that the campaign contributions we receive do not in any way control our votes, but I venture to say that not many believe it." 120 Cong. Rec. S.4553 (daily ed. March 27, 1974).

[16] Herbert Kalmbach pleaded guilty to promising an ambassadorship in return for a $100,000 contribution, and testified before a Senate Committee that similar arrangements had been made with another ambassadorial candidate. Final Report of the Senate Select Comm. on Presidential Campaign Activities, S. Rep. 93-981, pp. 497-98, 631 (1974); Findings I, ¶¶121-22, II J.A. 154.



risen sharply as federal taxation, regulation and spending have increased. The expectations of business contributors are various. A contributor of $100,000 during the 1972 election campaign testified that he was seeking not so much to help in the election as to secure the lifting of an order suspending him from taking construction contracts.[17] The timing of other large gifts suggests similar motivation. The Milk Producers Association, for example, pledged $2,000,000 to the 1972 campaign at the very moment at which the incumbent officials were deciding whether to raise the support price for milk.[18] Other large contributors testified they were moved by fear that their competitors would fare better than they in dealing with government agencies unless they matched their rivals' contributions.[19] Still others hope only to obtain the entree to the offices of high government officials charged with decisions affecting their business interests which they suppose — often quite erroneously — that they would otherwise lack, preferably an entree under the auspices of an influential figure in Congress, the White House or a political party, whose pleasure or displeasure could affect the responsible official.[20] Although no one can define the effect of such con-

[17] Hearings Before the Senate Select Comm. on Presidential Campaign Activities, 93d Cong., 1st Sess. 5336 (1973).

[18] Finding I, ¶158, II J.A. 254; Final Report of the Senate Select Comm. on Presidential Campaign Activities, S. Rep. 93-981; pp. 581, 592-93, 645-48, 664, 671 (1974).

[19] Hearings Before the Senate Select Comm. on Presidential Campaign Activities, 93d Cong., 1st Sess. 5495, 5514 (1973).

[20] One corporate executive explained, "I think all we were attempting to do was to assure ourselves of a forum to be heard .... [W]e felt we needed something that would be sort of a calling card, something that would get us in the door and make our point of view heard." *Id.* at 5442. A campaign fund-raiser testified, "[I]n return for that [$100,000] contribution it would be possible for me to arrange for several appointments with various people within the White House...." *Id.* at 7583. *See generally* Findings I, ¶¶159-64, II J.A. 254-55.

tacts with precision, the risk of improper influence, conscious or unconscious, is hardly open to question.

Section 608(c) strikes at the source of the above evils. Putting a limit upon the aggregate size of each candidate's campaign expenditures reduces not only the risk of corrupt practices but the pressure to raise huge sums from contributors expecting official favor as their reward. Section 608(b)(1) deals even more directly with the danger of undue influence by forbidding financial contributions large enough to be corrupting. The other ceilings implement these basic limitations. Since no restriction is imposed upon individual contributions to a standing political committee which has expenses for general purposes, such a committee is forbidden to contribute more than $5,000 to a candidate with respect to any single election. Section 608 (b)(2). Because experience showed that the proliferation of *ad hoc* political committees was a handy device for circumventing earlier regulation of campaign financing,[21] the privilege to give a candidate up to $5,000 is limited to committees with enough permanency and scope to have been registered for six months, to have received contributions from at least 50 persons, and either to be part of a State party organization or to have made contributions to five or more candidates for federal office. *Ibid.*

The ban against individual contributions in excess of $1000, standing alone, would give marked adavantage to candidates able to draw upon sizeable personal or family fortunes. Section 608(a)(1) counters this danger by limiting the total amount a candidate and his immediate family may "contribute" to his own campaign to $50,000 in the case of Presidential or Vice Presidential candidacy, to $35,000 in a Senatorial campaign and to $25,000 in running for Representative.

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[21] Finding I, ¶137, II J.A. 190.



The ceilings on individual contributions to a candidate and on candidate expenditures could be easily evaded if wealthy potential contributors were allowed to make unlimited direct personal expenditures in support of candidates. The function of Section 608(e)(1) is to close this gap by limiting expenditures by a person or group "relative to a clearly identified candidate . . . advocating the election or defeat of such candidate" to an additional $1000.[22]

The magnitude and value of the public interests served by these interrelated restrictions show that the justification is "paramount" or "compelling" in the constitutional sense. Earlier decisions, while not precisely in point, sustain this conclusion. *Civil Service Commission* v. *Letter Carriers Union,* 413 U.S. 548 (1973), held that the pursuit of such objectives justifies some curtailment of freedom of association even when personal activity rather than the mere transfer of money is restricted. See also *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973); *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947). *Burroughs* v. *United States,* 290 U.S. 534 (1934), sustained reporting requirements imposed to secure the integrity of elections. In *United States* v. *UAW,* 352 U.S. 567 (1957), the dissenting opinion delivered by Mr. Justice Douglas, in which Chief Justice Warren and Justice Black concurred, urged the unconstitutionality of a statute forbidding political expenditures by labor unions, but the opinion also stated that Congress has power to impose a general prohibition upon large contributions if it finds that they create risk of undue influence. 352 U.S. at 598, n. 2.[23]

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[22] Section 608(e)(1) is discussed in more detail at pp. 54-63 below.

[23] *See* Rosenthal, Federal Regulation of Campaign Finance: Some Constitutional Questions 21 (1971) ("Spending money is not the same as speech-making, even if the former may foster the latter."); Freund, Commentary in *id.* at 72-73 ("[J]ust as the

More specifically, the ceilings on contributions and expenditures will deter violation or circumvention of the long-standing prohibition against corporate contributions to federal political candidates. 18 U.S.C. § 610. A high proportion of the large financial contributors are corporate executives. A list of the large contributors kept in the White House after the 1972 election was partially arranged by the names of the corporations with which the

volume of sound may be limited by law, so the volume of dollars may be limited without violating the First Amendment.''); Bickel, Commentary in *id.* at 65 (''[R]egulating the giving of money is not the same as regulating speech.''); Note, Statutory Regulation of Political Campaign Funds, 66 Harv. L. Rev. 1259, 1266 (1953); Developments in the Law—Elections, 88 Harv. L. Rev. 1111, 1264-65 (1975). (''[L]imits (on individual contributions) do not appear to place substantial burdens upon free speech ... [T]he limited incursion on freedom of speech that results from limiting dollar amount appears to be amply justified.''); Nicholson, ''Campaign Financing and Equal Protection,'' 26 Stan. L. Rev. 815, 844-46 (1974) (supporting limits on individual contributions to political campaigns.); Comment, ''The Constitutionality of Restrictions on Individual Contributions to Candidates in Federal Elections,'' 122 U. Pa. L. Rev. 1609, 1610-14 (1974) (same); Barrow, ''Regulation of Campaign Funding and Spending for Federal Office,'' 5 U. Mich. J. L. Reform 159, 190 (1972) (same). *See also* United States v. CIO, 335 U.S. 106, 139 (1948) (Rutledge, J., concurring) (''There can be little doubt of Congress' power to regulate the making of political contributions and expenditures by labor unions, as well as by other organizations and individuals, in the interest of free and pure elections and the prevention of official corruption....''); United States v. Boyle, 482 F.2d 755, 763-64 (D.C. Cir.), *cert. denied*, 414 U.S 1076 (1973) (upholding constitutionality of §610 prohibition on political contributions by labor unions against First Amendment attack); United States v. Pipefitters Local 562, 434 F.2d 1116, 1122-1123 (8th Cir. 1970), *rev'd on other grounds*, 407 U.S. 385 (1972) (same); Egan v. United States, 137 F.2d 369 (8th Cir.), *cert. denied*, 320 U.S .788 (1943) (upholding constitutionality of prohibition on political contributions by public utility holding corporation). In addition to the federal government, eighteen states and the District of Columbia have enacted laws which limit the amount an individual may contribute to a political campaign. *See* Developments in the Law—Elections, 88 Harv. L. Rev. 1111, 1262 n. 158 & n. 159 (1975).



purported individual donors were associated.[24] Upon investigation, some of the contributions proved to have come from corporate funds.[25] Still others defeated the purpose, if not the letter, of the law. Individual officers could contribute out of their own funds but later receive equivalent bonuses from their corporations.[26] Even when there is no pre-arrangement or exact equivalent between contributions and reimbursement, there may be a vague though sufficient understanding that the executive's salary is set high enough to cover ''personal expenditures'' made for the benefit of the corporation, not excluding support for political candidates sympathetic to the corporation's interests.

Second, the ceilings imposed by the FECA amendments upon political contributions and expenditures serve the purpose of preserving public trust in the institutions of representative self-government. In *Civil Service Commission* v. *Letter Carriers Union*, 413 U.S. 548, 565 (1973), the Court observed:

> [I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to

[24] ''[B]y having the checks [of corporate employees] made out directly to the candidate, but mailed to the F[inance] C[ommittee to] R[eelect the] P[resident] together . . . there would be no public record of contributions classified by the company of the donor while there would be such a record at FCRP.... In a letter mailed to over 150,000 corporate officers, Maurice Stans stated: 'Our committee's records of the combined contributions from you and your associates will maximize recognition of your group's support of the President.' '' Final Report of the Senate Select Comm. on Presidential Campaign Activities 545-46, 93d Cong., 2d Sess. (1974).

[25] Findings I, ¶112-17, II J.A. 148-53.

[26] *See e.g.*, Testimony of Matthew Clark, Jr., Hearings Before the Senate Select Comm. on Presidential Campaign Activities 93d Cong., 1st Sess. 5404-19 (1973); Testimony of Robert Bartlome, *Id.* at 5419-38.

be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.

Whatever the true motives of those who give or receive the money, public confidence in government is disastrously shaken by events such as the acceptance of a $2 million pledge from the Milk Producers Association by an Administration which concurrently grants an increase in the support price of milk;[27] by the approval of American Airlines' route applications shortly after a large corporate contribution to the party in power;[28] and by the settlement of antitrust litigation against International Telephone & Telegraph Corporation, shortly after an ITT subsidiary agreed to underwrite a large proportion of the expenses of that party's national convention.[29] Senators and Representatives knew from personal experience,[30] as well as testimony and published commentary,[31] the chilling cycle which begins with ever-larger campaign spending and ends in alienation of the

[27] *See* Final Report of the Senate Select Comm. on Presidential Campaign Activities, S. Rep. 93-981, 93d Cong., 2d Sess. 664 (1974). *Id.* at 645-48.

[28] *See* Hearings Before the Senate Select Comm. on Presidential Campaign Activities, 93d Cong., 1st Sess. 5495-514 (1973).

[29] *See id.* at 3372-75; Final Report of the Senate Select Comm. on Presidential Campaign Activities, S. Rep. 93-981, 93d Cong., 2d Sess. 127-29 (1974).

[30] *See* above. *See also,* testimony of Senator James Abourezk, Hearings on S.372 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 93d Cong., 1st Sess. 207 (1973).

[31] Testimony of Louis Harris, Hearings on a Survey of Public Attitudes Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 93d Cong., 1st Sess. 6-8 (1973). *See also* Affidavit of James MacGregor Burns, Ex. H-1 to Proposed Findings of Fact of Defendants and Intervening Defendants Center for Public Financing of Elections, League of Women Voters of the United States, Clusen, Gregory, Jacknis, King, Noyes, Stern and Taft, at ¶¶6-8, 9-18; Affidavit of Arthur H. Miller, Ex. M-I to *Id.*, at ¶¶4, 5.



people from all aspects of the political process. Election victories by big spenders generate new pressure to spend still larger sums. The need for money sends candidates and their sponsors to large stockholders and corporate executives, most of whom have interests directly affected from time to time by governmental action.[32] Later, decisions favoring those interests are rendered by officials and governmental bodies subject to pressure from the successful candidates or the political party which received the donations and must keep in mind the next election. How often is the sequence one of cause and effect? The outsider cannot know. Even the participants who were sufficiently introspective to try to analyze their mental processes, might find it hard to discern the influence. The competitor who received the unfavorable decision will think it wise to take out an "insurance policy" in the next political campaign.[33] Citizens who observe this course of events need little cynicism to conclude that the world of politics and governments serves chiefly those with the "big money" that goes with political success.

Perhaps the cynicism of such businessmen and the alienation of such citizens rests, at least in some degree, upon

[32] "[W]here we had to look for the major source of money was to the people of wealth, the people of means, who were willing and able to contribute more of what they had in proportion to their wealth." Testimony of Maurice Stans, United States v. Mitchell and Stans, 73 Tr. 439, Tr. at 8204 (S.D.N.Y. April 18, 1974); "The role of interest groups and large contributors increases directly with the expense of campaigns." Hearings on H.R. 7612 and S.372 Before the Subcom. on Elections of the House Comm. on House Administration, 93d Cong., 1st Sess. 203 (1973).

[33] For example, George Spater, former Chairman of American Airlines, testified:

> "[M]ost contributions from the business community are not volunteered to seek competitive advantage but are made in response to pressure for fear of a competitive disadvantage that might result if they are not made. . . ." Hearings Before the Senate Select Comm. on Presidential Campaign Activities, 93d Cong., 1st Sess. 5495 (1973).

the failure to appreciate the full integrity of both candidates and officials. The precise extent of the discrepancy between image and reality is not important in adjudicating the present issue. As held in the *Letter Carriers'* case, dispelling both the danger and the appearance of corrosive influence, in order to preserve confidence in government of, by and for the people, is a paramount public purpose.

A third compelling public purpose of the interrelated ceilings is to open up the political process.[34] An apparent need for ever-heavier spending and correspondingly larger contributions would discourage the candidacies of men and women who lack great personal wealth or access to large contributors. The need would also deter individuals who might come forward but for unwillingness to put themselves in a position where they might have to choose later in the campaign between incurring personal obligation to a questionable contributor whose financial help was necessary to carry the day and letting down those who had already given him devoted personal assistance. The constitutional interest in removing financial barriers to candidacy has already been eloquently stated by the Court. *Bullock* v. *Carter,* 405 U.S. 134, 144 (1972); *Lubin* v. *Panish,* 415 U.S. 709, 718 (1974).

The ceilings will also increase the opportunity of less

[34] The policy of opening up the political process is also illustrated by provisions not at issue in this proceeding. For example, an amendment to 18 U.S.C. §610 prohibiting contributions and expenditures by corporations or labor organizations provides that prohibition "shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; non-partisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; [or] the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization . . . ."



affluent citizens to engage in the meaningful exercise of their First Amendment rights. The pressure upon candidates to raise money from large contributors had become so great as to leave them little time for ordinary citizens.[35] The opportunities that wealthy potential donors previously enjoyed for pressing their views upon candidates and the pressure upon candidates to accede to them are dramatically illustrated by a letter which Appellant Mott wrote to Hubert H. Humphrey during the 1968 campaign for the Presidency:

> [M]ost of us ["key McCarthy supporters"] are reserving our donations to give towards the campaigns of "peace" candidates. . . . I came to the conclusion that the least we . . . could do for you would be to give you a hearing . . . . If we become "turned on" and enthusiastic towards your candidacy, we have the capacity to give $1,000,000 or more to your campaign — and raise twice or three times that amount. But we will each make our own individual judgments on the basis of how you answer our several questions and how you conduct your campaign in the coming weeks.[36]

Similarly, more nearly equal opportunity to petition the government for the redress of grievances will result from eliminating the large-scale financial support by which cam-

[35] *See* Statement of Joseph Cole, National Finance Chairman, Democratic National Committee, Hearings on H.R.7612 and S.372 Before the Subcomm. on Elections of the House Comm. on House Administration, 93d Cong., 1st Sess. 138 (1973); Statement of Senator Hollings, Hearings on S.382 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 92d Cong., 1st Sess. 78 (1971). *See also* Finding I, ¶170, II J.A. 175.

[36] Mott Deposition, Ex. 5, *confirmed,* Hearings Before the Senate Select Comm. on Presidential Campaign Activities, 93d Cong., 1st Sess. 4336 (1973).

paign contributors sought entree under powerful auspices to executive departments and administrative agencies.[37]

The Attorney General treats these interests as if Congress were attempting to reduce the speech of the wealthy in order to make more room for the speech of those with lesser means (Br. pp. 52-54). We make no such argument, nor does the constitutionality of the statute depend upon any such treacherous ground. It is not for Congress to judge the relative values of different forms of speech or the relative claims of different speakers. The dangers to which we refer are the pressure upon candidates to accede to the wishes of wealthy potential contributors in order to obtain their money, not because of their words, and also the pressure to arrange meetings with government officials for those who have given money in order to repay the political debt.

In our view, therefore, the "compelling" nature and "paramount" value of the interests served by the package of ceilings on political contributions and expenditures are beyond serious doubt.

Appellants' contention that the ceilings upon contributions and expenditures have no "compelling" justification is primarily an effort to reargue the facts. Their brief (pp. 55-75) seeks to minimize the incidents brought to the attention of Congress, denies the danger of serious corruption, and attributes the enactment of the legislation to

[37] "[I]n return for that [$100,000] contribution it would be possible for me to arrange for several appointments with various people within the White House. . . ." Testimony of Herbert Kalmbach, Final Report of the Senate Select Comm. on Presidential Campaign Activities, S. Rep. No. 981, 93d Cong., 2d Sess. 593 (1974); "I think all we were attempting to do was to assure ourselves a forum to be heard. . . . [W]e felt we needed something that would be sort of a calling card, something that would get us in the door and make our point of view heard." Testimony of Orin Atkins, Chairman of the Board of Ashland Oil, Hearings Before the Senate Select Comm. on Presidential Campaign Activities, 93d Cong., 1st Sess. 5442 (1973).



hysteria induced by the Watergate investigations. The argument misreads events. Congress has proceeded with extraordinary care and deliberation. The history of congressional concern through the 1950's is recounted in *United States* v. *UAW*, 352 U.S. 567, 570-84 (1957) and in an appendix to the opinion of the court of appeals (J.S. App. 1589-93). Between 1966 and 1975 the entire subject was considered and reconsidered with a high level of public attention. During this period three major laws were enacted and later revised. Presidential Election Campaign Fund Act, P.L. 89-908, 80 Stat. 1587 (1966); Federal Election Campaign Act of 1971, P.L. 92-225, 86 Stat. 3 (1972); Subtitle H of the Internal Revenue Code, P.L. 92-178, 85 Stat. 562 (1971); Federal Election Campaign Act Amendments of 1974, P.L. 93-443, 88 Stat. 1263 (1975). There were elaborate hearings.[38] When Congress revisited the entire subject in 1973 and 1974 after observing the operation of earlier laws in the 1972 elections, there were three careful Senate reports, two reports by the Committee on Rules and Administration (S. Reps. 93-310, 93-689) and one by the Committee on Commerce (S. Rep. 93-170). An elaborate report was also filed by the House Committee on Administration (H.R. 93-1239). There was protracted

[38] Hearings Before the Subcomm. on Elections of the House Comm. on House Administration on H.R. 15317 and Related Bills to Revise the Federal Election Laws, 89th Cong., 2d Sess. (1966); Hearings Before the Senate Comm. on Finance on Various Proposals for Financing of Political Campaigns, 90th Cong., 1st Sess. (1967); Hearings Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration on Bills Proposing Amendments to and Improvements in the Federal Election Laws, 90th Cong., 1st Sess. (1967); Hearings Before the Subcomm. on Elections of the House Comm. on House Administration on H.R. 8284 to Limit Campaign Expenditures By or on Behalf of Candidates for Federal Elective Office and For Other Purposes, 92d Cong., 1st Sess. (1971); Hearings Before the Subcomm. on Elections of the House Comm. on House Administration on H.R. 7612 to Improve the Conduct and Regulation of Federal Election Campaign Activities and to Provide Public Financing for Such Campaigns, 93d Cong., 1st Sess. (1973).

debate in both chambers and an elaborate Conference Report (S. Rep. 93-1237). The present law represents the considered findings and deliberate judgment of the Congress.

Appellants' effort to reargue the underlying questions of fact and redebate the wisdom or folly of the measure misconceives the function of the Judiciary. The preferred place of First Amendment freedoms in the hierarchy of constitutional values requires the Court to examine the character of the purposes assigned to any legislation which may operate in a way that restricts opportunities for gaining the widest benefit from freedom of speech and association, so that it may determine whether the purposes are "paramount" or "compelling." See pp. 24-31 above. In the instant case, for example, it is for the Court to judge whether securing the integrity of government and public confidence therein is a sufficiently high objective to justify some interference with a candidate's enjoyment of opportunities for gaining the widest benefit from the exercise of freedom of speech. Similarly, it is a function of the Court to examine for itself the fit between the provisions of the statute and the assigned justifications. See pp. 50-54 below. If the commands which may result in curtailment of opportunities for expression or association are of a character demonstrably broader than required by the assigned justification, then the Court will judge the law unconstitutional.

Once these requirements are satisfied, the judicial role is limited. Judges do not sit as legislators to inquire into social, economic or political conditions in order to resolve questions of fact, to make judgments of proximity and degree upon the seriousness of the threat to the public welfare or the efficacy of the remedy, and then to decide whether, as legislators, they would vote for or against the measure. Quite possibly, judicial scrutiny of the facts must



be somewhat closer in cases involving First Amendment freedoms than under the Commerce Clause[39] or Fifth and Fourteenth Amendments,[40] in order to guard against circumvention of First Amendment guarantees, but we know of no case in which the Court has sifted a variety of data for the purpose of deciding whether it would reach the same conclusion as Congress upon the quantitative magnitude or urgency of an acknowledged danger, or upon the wisdom of the congressional remedy. The limit of the inquiry should be whether the judgments attributable to Congress rest upon an honest and solid foundation, rather than subterfuge or mere speculation. The only direct precedents indicate that the Court will not review congressional findings of fact even in cases under the First Amendment. *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 94-95, 169-70 (1961). See also, *United States* v. *Robel,* 389 U.S. 258, 271, 285 (1967) (Brennan, J., concurring; White and Harlan, JJ., dissenting).

In the present case, in our judgment, the congressional findings of fact and appraisal of the degree of danger to compelling public interests are entirely correct. Even if that conclusion be debatable, the congressional assessments surely rest, as shown above, upon a solid foundation of

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[39] In upholding congressional enactments under the Commerce Clause and Section 5 of the Fourteenth Amendment the Court has consistently held that it is for Congress to determine the facts and weigh the various considerations, subject only to a requirement of rationality. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258, 261-62 (1964); Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964); Katzenbach v. Morgan, 384 U.S. 641, 653, 656 (1966); Oregon v. Mitchell, 400 U.S. 112, 133, 248 (1970) (opinions of the Court and of Justices Brennan, White and Marshall dissenting).

[40] The same rule applies under the Due Process Clauses. Munn v. Illinois, 94 U.S. 113, 125 (1876); McLean v. Arkansas, 211 U.S. 539, 550-51 (1909). *See also* McGowan v. Maryland, 366 U.S. 420 426 (1961).

testimony and experience, to which both Senate and House gave long and careful consideration.

3. *The Compelling Purposes of the Ceilings upon Campaign Contributions and Expeditures Cannot Be Achieved by Less Restrictive Measures.*

The FECA and FECA Amendments of 1974 strike directly at the threats of corrupting financial influence upon the integrity of representative government. The method is no broader than the dangers to be met. By putting a limit upon each candidate's campaign expenditures, Section 608(c) stops the rising spiral of campaign costs and limits the pressure to raise more and more money from every possible source. Section 608(b)(1) deals more directly with the danger of improper financial influence by forbidding contributions large enough to be corrupting. The ceiling on over-all expenditures, standing alone, would not be sufficient to eliminate the risks of undue influence flowing from gratitude to large contributors. The ceilings upon individual gifts would be neither workable nor credible in political campaigns characterized by the massive spending invited by the absence of a limit on over-all expenditures. The subsidiary ceilings supplement the principal limits. Appellants suggest no adequate method of achieving the statutory purposes which would have less practical impact upon opportunities to get the maximum benefit from freedom of speech.[41]

[41] We are persuaded that substituting government appropriations for private financing of Congressional campaigns would serve the public interest still better than the present law but such a measure would necessarily contain restrictions very similar to those of which plaintiffs complain. Amendment 406 to S.372, 93d Cong., 1st Sess. (1973); S.2297, 93d Cong., 1st Sess. (1973); S.4196, 93d Cong., 2d Sess. (1974); S.564, 94th Cong., 1st Sess. (1975). In limiting public financing to Presidential elections, Congress not unreasonably chose to proceed one step at a time, gaining experience before it extended the remedy. The Court has consistently held that the Constitution leaves room for such legislative judgments. *See e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); Dandridge v. Williams, 397 U.S. 471, 486-87 (1969); Geduldig v. Aiello, 417 U.S. 484, 495 (1973).



Disclosure laws are obviously inadequate. They may tend to deter successful candidates from blatantly serving the interests of large financial contributors in direct and public fashion. They do nothing to check the wild spending which produces the pressure to raise vast sums from large contributors with business interests subject to government regulation and nothing to reduce either the donor's expectation of benefit or the recipient's sense of obligation (even though undefined). Nor do disclosure laws open up the political process, halting the alienation of masses of citizens, nor preserve and rebuild faith in the political process.

Bribery laws are obviously inadequate to relieve candidates of the pressure to raise huge campaign funds from every possible source, including contributors expecting their money to influence legislative and executive decisions. The wealthy financial contributor and the recipient can be punished for bribery only if the one pays and the other receives the contribution in return for a promise of specific official action. The dangers to which the present legislation is addressed are more subtle. The donor may seek no commitment to a particular course of action or even to some unspecified favor. The successful candidate may nevertheless come under heavy pressure from his sense of political indebtedness plus his realization that he will need financial aid again in the next election. The successful candidate may be unwilling or unable to do more than pass word of the contributor's political importance along to other officials. At that point, the interplay of pressures and conscience becomes too complex for generalization except to say that adding first the influence of

huge sums of money and later the political pressure upon administrative and executive officials carries grave risk of corrupting individuals, politics and government. A public office is still a public trust. In government even more than in private life, there is need to protect the trustees and their beneficiaries not merely from the temptations of outright bribery but also from the complex pressures of conflicts of interest.

The suggestion that Congress should have listed only specified categories of contributions which create danger of improper influence is unworkable. The problem of exhaustive definition could not be solved without requiring investigations and proof so elaborate as to defeat enforcement. Neither candidate nor contributor can always tell what demands will be made for evidence of gratitude. Any workable list of "improper" contributions would necessarily refer to a few extrinsic proofs of impropriety, thus branding as morally reprehensible, and therefore unlawful, transactions which would be seen as wholly innocent if all the facts were known. Such draftsmanship carries its own dangers of discrimination and unfairness in relation to political activity. Congress could properly conclude that there was less danger of unfairness in the simple equality of putting all contributors and all candidates for the same office under one ceiling.

Appellants' criticisms of the exact dollar figures set by Congress ask the Court to substitute its judgment for that of Congress upon sundry questions of degree. That is not a judicial function, unless the limit is set so low as to be beyond solid defense. The ceilings on over-all expenditures are within the range supported by recent experience.[42] In fixing each dollar limit, effectiveness in promoting the congressional purposes had to be balanced against the risk of curtailing political debate. In some

[42] See pp. 31-34 above.



instances, adjustments had to be made in the interests of fairness and equality; for example, in setting a limit upon expenditures by a candidate and his immediate family.[43] The judicial inquiry into whether the public purposes of a statute regulating conduct could be adequately served by some measure having less tendency to limit the enjoyment of First Amendment freedoms goes only to the character of the legislation and its scope. Where, as here, the public needs are so compelling as to justify uniform, all-embracing restrictions upon the donation and use of financial power in political campaigns, it is for Congress alone to determine, within reasonable limits, the exact point at which the balance should be struck. See pp. 48-49 above.

Accordingly, we submit that any tendency of the ceilings upon campaign contributions and expenditures to limit the enjoyment of opportunities for freedom of speech and association is amply justified by the "compelling" and "paramount" public interests which the ceilings serve and which cannot be satisfied by less restrictive measures.

Appellants also complain (Br. pp. 93-94) that the ceilings should be more particular. The limit upon individual contributions, for example, is said to be unconstitutional because it is uniform, without variation according to the office which the candidate is seeking, the costs of the particular campaign, the identity of each donor, the situation of each recipient, etc. Similarly, appellants attack the fixing of a uniform formula for determining the ceiling on expenditures in all elections for Senator, and of a uniform ceiling in all elections for Representative in States having more than one Representative, regardless of the character of the particular district. The short answer is that the Constitution does not require the impossible, nor does it mandate the substitution of sophisticated complex-

[43] See pp. 72-73 below.

ity for a simple measure of equality. Many variables affect the cost of campaigning in different states and districts: geography, social and economic character, the kinds of media available, the level of prices, local political customs, etc. Congress could not investigate these factors in order to set a figure which would provide exactly equal "vote-influencing power" in every State and district. No formula will measure them. Use of population as measure regardless of State or district treats every candidate alike and avoids the risk of invidious discrimination by providing equality according to a direct and understandable measure: twelve cents for each person of voting age living in the State in elections of a Senator and $70,000 in congressional elections because the population of every district is substantially the same.

4. *The Limitation Imposed by Section 608(e) upon Independent Campaign Expenditures Not Authorized by a Candidate Is Constitutional as Enacted and as Applied to Any Situation Ripe for Adjudication.*

When the balance between the public needs served by a regulation of conduct and its restrictive effects upon practical opportunities for enjoyment of freedom of speech is otherwise close, it may be important to examine the proximity of the relation between the conduct regulated — here the use of large sums of money — and the truly personal enjoyment of liberty.

Most of the restrictions upon financial contributions and expenditures will have little effect upon anyone's personal speech or political activity. The effect of the overall ceiling upon the candidate's speech, or his spokesmen's, is that of any partial restriction upon the ability of a would-be speaker to gather a vast pool of money with which to



buy greater access to channels of mass communication. The effect upon the potential large contributor's personal enjoyment of freedom of expression is even more remote. The contributor seldom determines the use to which his money is put. Assuming the money to be pooled with all other receipts, some will go to pay rent, some to conduct polls, some to pay travel expenses or salaries, and some to cover the cost of public communications. The contributor seldom chooses the medium of expression or the character of the message. The words, with rare exceptions, are not his words; the ideas are not his thoughts. These characteristics of large financial contributions further strengthen our submission that the statutory restrictions upon size do not violate the First Amendment.

In some of its possible applications Section 608(e) presents a slightly different problem. Section 608(e) forbids any person to expend more than $1,000 in any one election to support a candidate, or to defeat his opponent, even without consulting the candidate. The language is tightly drawn so as not to discourage political discussion oriented towards public issues. The restriction applies only to publications "relative to a clearly identified candidate" and only to those "advocating the election or defeat" of that particular person. By the definition of "expenditure" in Section 591(f) Congress made certain that Section 608(e) would not interfere with any individual's personal activities in speaking, writing or canvassing for a candidate, or in performing other services, without using money to expand the reach of his words. Yet even with these limitations, Section 608(e) covers forms of conduct which are diverse when measured by their relation to personal enjoyment of freedom of expression. At one end of its range, Section 608(e) prohibits a wealthy supporter from spending more than $1,000 for such assistance as hiring an advertising agency to promote an "independent" cam-

paign for a candidate's benefit, *i.e.*, a campaign for which the candidate's authority was not obtained and which, therefore, would not count against his expenditure ceiling under Section 608(e)(2)(B). In their broadest reaches, the words of Section 608(e) appear also to bar an outlay of more than $1,000 to broadcast one's own speech in support of a candidate, or of more than $1,500 for travel expenses incurred in making speeches.[44] The former restriction has no more affect upon personal enjoyment of freedom of speech than the ceiling upon contributions. The latter restriction upon the individual's use of money would proximately affect his personal enjoyment of opportunities to publish his own thoughts.

The court of appeals, after giving Section 608(e) a narrow interpretation, sustained it as "a loophole closing provision." (J.S. App. 1530) We urge that the ruling is correct in terms of the facial constitutionality of Section 608(e) and as it is applicable to any situation presented in the instant case. We believe that even the hypothetical applications would be constitutional but the question, being closer, should be reserved for the future.

The court of appeals rightly discerned the function of Section 608(e). Although the ceilings upon contributions and aggregate expenditures would be useful by themselves, Congress realized that their efficacy would be reduced without some limitation upon a variety of independent expenditures. Experience under earlier laws regulating the financing of political campaigns had convincingly demonstrated the danger of circumvention, evasion and outright violation.[45] The $1,000 ceiling upon individual contributions and the over-all ceiling upon ex-

[44] Section 591(e) exempts from the definition of expenditure the first $500 of an individual's unreimbursed travel expenses. In addition, an individual is allowed up to $1,000 of independent expenditures on behalf of a candidate.

[45] See J.S. App. 1512; Findings I, ¶¶139, 139-43, II J.A. 190-92.



penditures by or on behalf of a candidate could easily be circumvented, if left to stand alone, by massive expenditures for campaign advertising and other forms of mass communication made in support of a candidate without any provable communication between the supporter or group of supporters and the candidate or his agents. A wealthy, potential contributor, for example, instead of giving $100,000 to a candidate for his campaign, might spend the sum for newspaper or billboard advertising, the broadcast of radio and television "spots," the distribution of campaign literature, etc. If the expenditure were made without some kind of advance communication between the candidate and his benefactor, its effectiveness might be reduced because of the lack of coordination with other outlays, but no great amount of imagination is required to reduce the difficulty. The wealthy supporter might copy newspaper advertisements used earlier in the campaign or in other cities. He might buy television time to rebroadcast earlier "spots" or film clips. The benefactor might even let the candidate's manager know early in the campaign that he would spend his $100,000 on advertising in a particular city, handled by a named agency with political experience, yet he could still avoid obtaining the authority which would make the expenditure attributable to the candidate under Section 608(e)(2)(B) by loudly asserting that he would pursue this course regardless of whether the candidate approved or objected to his independent undertaking.

Numerous independent expenditures of this character would make mockery of the effort to limit campaign spending. They would create many of the dangers of abuse inherent in vast expenditures on behalf of candidates and in large financial contributions. Members of the public might well doubt the bona fides of claims of independence. Opposing candidates would feel heavy pressure to match

the financial outlay lest they lose the election. This class of independent expenditures, moreover, involves no more personal exercise of freedom of expression than contributions for the same purposes. Congress was well aware of the danger and repeatedly emphasized the need to close an obvious loophole. S. Rep. 93-170, 93d Cong., 1st Sess. 71 (1973); H.R. Rep. 93-1239, pp. 6-7 (1974); S. Rep. 93-310, pp. 12-13 (1973); S. Rep. 93-1237, pp. 56-57 (1974).

Given the need for limiting some kinds of ostensibly independent expenditures and the desire not to interfere with truly personal activities (as distinguished from financial assistance), the problem becomes one of drawing lines. Two solutions present themselves: (i) to distinguish between independent expenditures which serve essentially the same campaign functions as contributions, on the one hand, and, on the other hand, independent expenditures which are incidental to the individual's personal exercise of freedom of expression; or (ii) to draw the line between truly personal activity, on one side, and spending money, on the other (except for incidental expenses so small as to pose no threat to the basic limitations).

Congress, with full concern for the questions of personal liberty,[46] chose the second course. The definition of "ex-

[46] "Admittedly, expenditures made directly by an individual to urge support of a candidate pose First Amendment issues more vividly than do financial contributions to a campaign fund. Nevertheless, to prohibit a $60,000 direct contribution to be used for a TV spot commercial but then to permit the would-be contributor to purchase the time himself, and place a commercial endorsing the candidate, would exalt constitutional form over substance. Your Committee does not believe the First Amendment requires such a wooden construction. If Congress may, consistently with the First Amendment, limit contributions to preserve the integrity of the electoral process, then it also can constitutionally limit independent expenditures in order to make the contribution limits effective." S. Rep. 93-689, p. ___ (1974); "The committee is mindful that an absolute proscription of independent campaign-related spending may well offend the guarantees of the First Amendment and would be poor public policy in inhibiting the free expression of views on vital issues. However, it is believed that a reasonable limitation on such spending, in the context of an overall effort to maintain the integrity of the electoral process is feasible and Constitutionally permissible. . . . The committee is convinced that this approach makes possible the adequate presentation of candidate-related views by independent groups and at the same time safeguards the integrity of the candidate spending limits. In this way, the bill effectively reconciles the interests of Congress in promoting both free speech and the effective regulation of Federal election campaigns." H.R. Rep. 93-1239, p. 6 (1974).



penditure" in Section 591(f) excludes all personal political activities such as speaking, writing or canvassing for a candidate, or performing other services. In order to facilitate truly personal activity Congress provided that the payment of incidental expenses for food or travel should be exempt from Section 608(e), up to $500. But, with this exception, Section 608(e) reaches all outlays sufficiently tied to a specified candidate and specifically aimed at bringing about his election.

The congressional choice is sustained by four persuasive considerations:

First, it is extremely difficult to draw a fair and clear-cut line between the expenditure of money in connection with truly personal political activity and the mere purchase of services or use of a medium of mass communication. Buying a full page of advertising space in *The New York Times* to publish a letter appealing for the election of a named candidate may fall on the "personal" side of the line. Buying television spots to rebroadcast film clips made by the candidate is pretty clearly the mere expenditure of money. But the full-page advertisement might be one previously used by the candidate and slightly revised by the purchaser of advertising space, or it might be drafted by the purchaser and thoroughly rewritten by a professional writer of advertising copy. The page might be used to display a large picture of the candidate together with a few slogans chosen by his benefactor from the candidate's

own publicity. Joint expenditures by a few individuals would raise other borderline questions.[47] The mixture of "money purchase" and "personal involvement" is susceptible of infinite variation. So far as we can discern, if Congress had chosen this alternative, the draftsman could have done no more than articulate the abstract principle and leave its precise application to case-by-case decision.

Second, the danger that Section 608(e) will substantially restrict personal political activities seems largely, if not wholly, hypothetical. No appellant alleges that he desires to spend more than $1,500 to promote in behalf of a candidate activities of the kind we characterize as "personal." None shows, in concrete instance, that he will lose the benefit of such activity and expenditure if Section 608(e) is enforced. It is difficult, moreover, to recall any significant number of individuals other than office-holders or prospective political candidates who have ever expended more than $1,500 of their personal funds in order to speak for or against a clearly identified candidate without the invitation or other authorization which would take the expenditure out of Section 608(e) by making it chargeable against the candidate's expenditure ceiling.[48] Considerably more sup-

[47] It is not clear whether a number of individuals who combine to purchase broadcasting time or a newspaper advertisement costing more than $1,000 on a single occasion are subject to Section 608(e). Section 608(e) prohibits any "person" from making any expenditures in excess of $1,000. Section 591(g) defines "person" to include any "commission, association, corporation or any other organization or group of persons." It would seem entirely probable to interpret the words "group of persons" under these circumstances to mean only a group having some more lasting existence than combining resources for a single expenditure. The Federal Election Committee has had no occasion to rule upon this question, but in interpreting the discovery sections, it has tentatively ruled that coming together for the purpose of purchasing a single advertisement does not constitute a political committee. 40 Fed. Reg. 44701 (Sept. 29, 1975).

[48] An individual's expenditures made independently of a candidate are not charged against the candidate's expenditure limit. However, under Section 608(e)(2)(B), an expenditure made on behalf of a candidate with the candidate's or his agent's authorization is charged against the candidate's ceiling. If a candidate invited the individual to speak on his behalf, that invitation would be an authorization, and would take the expenditure out of Section 608(e).



porters buy advertising space, but here the element of personal activity is inconsequential.

Third, past and present office-holders would almost surely form a very large proportion of the small number of individuals who might spend more than $1,000 of their own money making uninvited speeches in support of another candidate. Such speeches increase the public exposure of the office-holder or prospective future candidate who makes them. The chief consequence of shifting the line to allow independent expenditures in aid of truly personal activities, therefore, would be to increase the advantage of candidates who know public office-holders with large personal means, and of such office-holders in gaining exposure for their own political purposes.

Fourth, even the limit on spending more than $1,000 to propagate one's own speech or writing in support of a clearly identified candidate is somewhat less of an invasion of personal liberty than it initially seems. The liberty is not one that more than a very small fraction of the people can afford to exercise. There is no restriction, as we have said, upon the personal activities not requiring large sums of money, which are open to all. There is also no restriction upon expenditures to promote the widest discussion of particular political causes without specifically tying the advocacy to a clearly identified candidate.

Under these circumstances, it would seem quite wrong to attempt to tear the few most extreme imaginable applications of Section 608(e) out of the continuum of spending in order to ask whether the isolated instances would carry by themselves such threat to the public welfare as to justify thus restricting the ability to buy facilities for

gaining the maximum benefit from freedom of speech. The contribution which the extreme instances make to the workability of the entire plan and the fairness of drawing the line at the point chosen are major additional elements of justification. When a line has to be drawn and is drawn at the point which Congress could well judge to be clearer and fairer than any other, the critical question is whether the purposes served by the prohibition of the whole class of activities justify the resulting diminution of practical opportunities for the maximum enjoyment of freedom of speech. In this case, the overall justification is more than adequate, for the reasons stated at pp. 34-50 above. Consequently, if the question is here, Section 608(e) should be held constitutional in its farthest conceivable reaches.

But that question need not, and therefore should not, be decided in the present case. Neither the pleadings nor the proof names any person who wishes to make such outlays, much less describes the circumstances and mixture of financial expenditure and personal activity involved. Appellant Mott alleges that he "has made expenditures on behalf of clearly identified candidates but independent of such candidates in excess of $4,000 and intends to do so in the future." (I J.A. 39). The allegation gives no information about the character of his independent activities. His reports filed under the earlier law indicate that he expended in the neighborhood of $17,000 in publicizing his views about clearly identified candidates, all of which went to an advertising agency. There is no indication of how the copy was prepared. Mr. Mott's affidavit gives no more concrete information about his activities or intentions. At this stage, therefore, the problem raised by some possible applications of Section 608(e) is hypothetical; the most difficult of the imaginable constitutional questions may never arise.

Such questions do not have to be decided hypothetically



because even a decision against constitutionality in these instances would not render Section 608(e) unconstitutional on its face. Section 608(e) applies to a broad range of expenditures involving neither speech nor other personal political activities on the part of the spender. In most of the applications now foreseeable the element of personal speech or association is very small. Throughout most of its range, therefore, Section 608(e) is constitutional for the reasons stated in discussing the ceilings on individual contributions and overall expenditures (pp. 22-54 above). Under these circumstances the Court should reject the facial attack upon grounds of overbreadth and avoid the unnecessary decision of hypothetical questions. For the case is one where conduct, *i.e.*, spending money, is involved and the overbreadth, if any, is insubstantial judged in relation to the statute's plainly legitimate sweep. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973); *California* v. *LaRue*, 409 U.S. 109, 116 (1972).

C. *The Limitations Upon Financial Contributions And Expenditures Are Not Inherently Discriminatory In A Constitutional Sense.*

The limitations imposed by Section 608(c) of 18 U.S.C. upon aggregate campaign expenditures by or on behalf of candidates for federal office apply alike to each and every candidate for the same office. Section 608(c) draws no distinctions between persons, political parties, social or economic organizations, or other groups. It does not favor or disfavor any political opinion or ideology. In terms, the provisions imposing the ceilings are as evenhanded as the words can be.

Similarly, the limitations imposed by Sections 608(a) and (e) upon individual contributions and expenditures apply equally to each and every candidate for the same office. They too make no invidious distinctions, and prefer

no economic or political opinion or group. A few special categories, such as expenditures from a candidate's immediate family resources (Section 608(a)(1)), were required by considerations of fairness or practicality. Lines such as those in Section 608(e) had to be drawn between the prohibited and the permitted even though the kinds of financial practices leading to dangerous abuses sometimes shade by very gradual degrees into desirable participation in self-government.[49] None of the classifications is drawn in terms of political ideology or affiliation. None involves hostile or invidious discrimination.

Appellants nevertheless charge many varieties of unconstitutional discrimination. We deal first with the allegation that the ceilings on individual contributions and candidates' expenditures discriminate in favor of incumbents against challengers (pp. 64-71 below). We then turn to the other claims of unconstitutional discrimination (pp. 71-73 below).

1. *The Ceilings Upon Individual Contributions and Candidates' Expenditures Do Not Discriminate Against Any Type of Candidate or Party, Either Inherently or Insofar as Their Operation Can Now Be Projected.*

The ceilings imposed by Section 608 apply alike to all candidates and financial contributors without regard to party or other form of political sentiment. The ceilings apply equally to challengers and incumbents. Neither express language nor euphemism nor disingenuous circumlocution introduces any form of differentiation. There is no argument, as we understand appellants' brief, that Section 608 results in any systematic discrimination always

[49] Section 608(e) is discussed in more detail at pp. 54-63 above.



favoring incumbents and established parties as a class.

Rather, the contention is that challengers and new parties should not be subject to the same financial rules as others because they have more need for massive spending and wealthy contributors in order to win election through the power of money.

One branch of this contention is the complaint that other laws and facts of political life result in discrimination because incumbent Senators and Representatives enjoy methods of communicating with voters and bringing themselves to public attention which are not available to those who run against them. Congressional staff, franked mail, congressional-recording studios, office space, the ability to hold hearings within the constituency and like responsibilities and perquisites of office, including the ability to make news, are cited as examples.

These facilities are provided in order to enable Senators and Representatives to perform their duties, including the duty to assist constituents in dealing with the executive departments and administrative agencies, provide them with information published by the government, and keep them informed about the conduct of public business. No one denies the propriety of these functions. Staff assistants and other facilities are requisite if the job is to be done well.

It is equally plain that outstanding service as a Senator or Representative brings greater public recognition and helps enormously in a campaign for reelection. The performance of official duty, whether individually or through official staff and facilities, inevitably has this twofold aspect. Appellants can hardly mean to argue that members of Congress must blind themselves to what all others know, or that the Constitution requires the government to provide challengers with some offsetting method of attracting ballots.

Rather, the implication seems to be that the staff and facilities provided to Congressmen are not really means of performing public duties but campaign facilities over and above the ceiling upon aggregate expenditures, which challengers have to purchase. In framing the FECA Congress took steps to prevent such abuse. Section 434(d) of 2 U.S.C. indicates that use of congressional television and recording studios is to be treated as an expenditure in election years. Chapter 32 of 39 U.S.C. limits the use of franked mail.

The drawing of lines between the proper performance of public duties with incidental political gains and the abuse of facilities for political purposes is undeniably difficult. Abuse may occur. That problem, however, is not before the Court in this case for three reasons:

First, appellants have proved no abuse, general or particular. So far as the record shows, the staff and facilities available to Congressman have been used only in the performance of their official duties, and any electoral advantages have flowed from good performance.

Second, if the legislation providing the frank and other public facilities is discriminatory or administered in a discriminatory fashion, the discrimination should be attacked directly in an appropriate action. Congress was required to treat all candidates equally in the FECA; it was not required to frame that Act so as to offset all other advantages or disadvantages of particular classes of candidates, whether proper or improper.

Third, no appellant is a victim of the discrimination because none is a challenger to an incumbent or alleges that he wishes to challenge an incumbent.

The second branch of appellants' argument — that the Constitution forbids applying the same limits upon contributions and expenditures to all candidates for the same office because uniform treatment operates to the advantage



of incumbents — is extrapolated by economic and political theory from statistics showing the expenditures in the 1972 and 1974 elections. The Brief for Intervening Appellees, pp. 112-29, 143-51, demonstrates the theoretical and factual errors in this analysis and then shows that, if any reliable conclusion can be drawn from the figures, it is that the ceilings do challengers to incumbents more good than harm. The court below concluded that any forecast would be much too speculative to warrant invalidating Section 608 (J.S. App. 1540-41). The correctness of that conclusion seems beyond question when one reflects that appellants' predictions are drawn from a statistically small sample in almost complete ignorance of all the important variables that affect the outcome of elections.[49a] That court's conclusion also implicitly recognizes the sound and fundamental principle that the duty of judicial review does not call upon the courts to conduct elaborate factual inquiries into matters proper for congressional determination in order to draw their own inferences and then to uphold or invalidate the act of Congress according to the preponderance of the evidence concerning its future effects. See pp. 48-50 above. For both reasons, we content ourselves with three short answers to appellants' contention:

First, appellants' claim only that the ceilings upon the size of financial contributions and a candidate's aggregate expenditures will operate in practice to "discriminate *generally* against challengers and *generally* in favor of incumbents." (Br. p. 94, emphasis added). The word

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[49a] For example, in 1972 and 1974 House races, a total of forty-eight incumbents were unseated in the general election. Of these, fourteen outspent their successful challengers by more than 15 percent; nineteen were themselves similarly outspent; and in fifteen races, the losing incumbent and the winning challenger expended approximately equal sums. Findings IIA, ¶¶3, 5, II J.A. 269-318, 326-86. We submit that the only significance of such figures is to demonstrate that none of the figuring demonstrates any useful conclusion.

"generally" veils the wide variations in the probable effects of the ceilings. Sometimes the ceilings will work to the advantage of a challenger. On other occasions they may benefit an incumbent. This much is undeniable. In any given case in which the ceiling on aggregate expenditures is high enough to allow a candidate an adequate opportunity to present himself to the public, the effect of the ceiling will depend upon two factors: (1) the relative ability of the candidates to raise and spend money in excess of the ceiling; (2) the relative gain to the candidates of spending each additional dollar. In any given case, these two forces may coincide or they may cut in opposite directions with the net effect depending upon which is the stronger. If the candidates have equal capacity to raise money for expenditures in excess of the ceiling, the restriction will bear hardest upon the one who would gain the most from each additional dollar expended. If the candidates have equal use for money, the ceilings will bear hardest upon the one who could otherwise raise and spend the largest sum. Individuals differ very widely in their ability to raise money as well as in their need to spend it. Assuming that appellants are right in asserting that the *average* marginal utility of a dollar expended is greater for challengers as a class than incumbents, still their argument proves nothing about the total effect of the ceilings because they fail to show that the challengers' average ability to raise money is not so greatly inferior to the average ability of incumbents as to more than offset any greater average need for spending.

Second, appellants show no more than that those who were gaining most from conduct injurious to the public interest will lose most from its prohibition. The statute sets up no classification except the prohibition uniformly applicable to all persons. Thus far, no question of equal



protection is raised.[50] Appellants then divide candidates into two classes, incumbents and challengers, and seek to show statistically that somewhat more candidates disadvantaged by the statute will fall in the second class than in the first. But one cannot make a case of unconstitutional discrimination by this kind of statistical prediction. When a statute is even-handed in its terms and actually disadvantages some members of both classes, proof of a denial of equal protection requires a stronger showing of systematic discrimination in the practical operation of the law than that on a statistical average it happens to bear somewhat harder upon one class than the other. *Jefferson* v. *Hackney*, 406 U.S. 535, 548, 575-76 (1972); *James* v. *Valtierra*, 402 U.S. 137 (1971).

Very few statutes bear with equal weight upon every person affected. An increase in the statutory minimum wage may put a firm which makes intensive use of labor under a serious disadvantage in competing with a rival manufacturer who has invested heavily in labor-saving equipment. An increase in corporate taxes might force

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[50] Every constitutional challenge to a statutory prohibition of some particular kind of conduct can be framed in the terminology of equal protection by asserting that the State's interest in prohibiting the conduct is insufficient to justify the State in treating those who engage in the conduct differently from other persons. The customary analysis is in terms of justification for the invasion of liberty or property. Nothing is changed by resorting to the language of equal protection because the "classification" can always be supported upon the same ground that justifies the invasion of liberty or property.

In the present case, we have shown that the interference with political opportunities of some candidates which results from the ceiling upon financial expenditures is justified by the "compelling" public interests which the limitations serve. See pp. _____ above. Proof of some slight tendency to limit the political effectiveness of more challengers than incumbents could have significance only if that balance were much closer than it is. Talk of discrimination in the practical operation of these even-handed rules raises no additional issue.

some Democratic newspapers to suspend publication yet scarcely affect their Republican rivals. The statute prohibiting federal officials from soliciting political contributions from their subordinates probably "discriminates" against the candidates of a party already in power for a long period. None of these laws, however, raises a problem of "discrimination" in the constitutional sense.

Third, there is not the slightest reason for measuring equality in the constitutional sense by appellants' theory of the marginal utility of a campaign dollar. The Senator quoted by appellants (Br. p. 99) who said that to allow challengers to spend more than incumbents would defeat the bill doubtless realized that such a measure would be universally perceived to be unequal. Translated into simple words, the marginal utility argument asserts that the constitutional ideal of equality requires the government to allow the otherwise weaker candidate to spend the largest sums of money in an election, if he can, in order to offset his other deficiencies. If he cannot speak effectively, he must have more money to hire professional entertainers. If he is ill-informed upon public issues, he must be allowed to spend more for ghost-writers. Because public recognition pretty regularly accompanies incumbency, fair and equal ceilings upon expenditures must allow a challenger a generous opportunity to present himself to the public. The present statutory ceilings are more than ample. Once that purpose is served, discrimination is avoided by treating the rivals exactly alike in the segment of their activities to which the law applies while leaving them where they were in every other aspect of their appeal to the electorate.



2. *The Other Statutory Distinctions Are Just and Reasonable.*

Appellants challenge two sorts of minor statutory provision as unconstitutionally discriminatory.

(1) One set of charges alleges discrimination in favor of candidates with the support of organized political committees or of a national political party, as opposed to candidates without those forms of organized support. Section 608(b)(2) allows a political committee registered for six months, which has received contributions from fifty persons and has contributed to five or more candidates for federal office, to contribute up to $5,000 to any candidate. Section 608(f) allows the national committee of a political party to expend two cents per potential voter in a Presidential election, and the national committee or a state committee to expend the same sum in elections to the Senate or House of Representatives.

Political parties and the organization which binds them together play major roles in our national political life. They provide both continuity and a degree of national coherence and unity. They furnish means of reaching concensus upon major policies and also important machinery for selecting candidates, even conducting through State and local organizations the caucuses or primaries necessary to choose candidates for office. See e.g., *Ray* v. *Blair,* 343 U.S. 214, 220-222 (1952); *American Party of Texas* v. *White,* 415 U.S. 767 (1974).

To distinguish between organizations that perform these functions and groups which make no similar contributions to our national political life is merely to permit party organizations to continue to perform their traditional functions, in the same manner as in the past but subject to limits upon the size of the contributions to candidates and of expenditures in their behalf. If party organizations

were deprived of this role entirely, they might shrivel and die. Any informal group is free to set up an organization which has the modicum of structure necessary to qualify as a national party with a national committee, or to qualify on a smaller scale as a program committee. The slight restriction imposed by Section 608(b)(2) — the requirement of six months registration as a political committee, contributions from 50 individuals and support of five candidates — is necessary, as the Court below observed (J.S. App. 1536), to prevent the proliferation of dummy committees which made mockery of the earlier Corrupt Practices Act. The differentiations resulting from Sections 608(b)(2) and 608(f) are therefore well within constitutional limits as heretofore expounded. Cf. *Jenness* v. *Fortson*, 403 U.S. 431 (1971); *Storer* v. *Brown*, 415 U.S. 724 (1974); *American Party of Texas* v. *White*, 415 U.S. 767 (1974).

Appellants also assert that Section 608(a) introduces an unconstitutional discrimination by allowing a candidate and his immediate family to expend much larger sums in an effort to win an election than another person would be allowed to expend or contribute.[50a] The imposition of the ceilings brings about greater equality by reducing the advantage of wealth as among persons seeking public office. In the absence of Section 608(a)(1), there would be no ceiling upon the contribution which a candidate and his immediate family might make to his own election. To distinguish between immediate family and other persons is to acknowledge a distinction in emotional concern recognized by all persons. Furthermore, the danger that a successful

[50a] The term immediate family means "a candidate's spouse, and any parent, child, grandparent, brother, and sister of the candidate, and the spouses of such persons." §608(a)(3). The ceiling is $50,000 in the case of a candidate for President or Vice President, $35,000 in the case of a candidate for Senator or Representative from a State which has only one representative or $25,000 for Representative from any other State.



candidate will be subject to improper influence from members of his immediate family because of their expenditures on his behalf is much less than in the case of contributions or expenditures by outsiders. Not only is the distinction reasonable, but it works no systemic differentiation for or against any class of candidates or other persons. Appellants rely upon a supposititious comparison between a candidate whose family's wealth permits an expenditure up to the applicable $25,000, $35,000 or $50,000 ceiling and a candidate who enjoys no family wealth but who would easily obtain that sum from a rich contributor. While this situation could conceivably develop, one can also imagine cases in which the candidate with family wealth would also have much greater access to wealthy contributors. Cases of the latter kind seem far more likely than cases of the former. Such abstract speculation does not make out a case of invidious and therefore unconstitutional discrimination.

## II

### The Requirements for Reporting and Disclosure of Campaign Contributions and Expenditures Are Constitutional on Their Face and Insofar as Their Operation Can Be Projected Upon This Record.

The Federal Election Campaign Act of 1971 and the Federal Election Campaign Act Amendments of 1974 tighten earlier federal requirements consolidated in the Corrupt Practices Act of 1925, 43 Stat. 1070 (1925), with respect to the maintenance of records and the disclosure of campaign contributions and expenditures. Section 431(d) now defines a "political committee" to include any group of persons which receives "contributions" or makes "expenditures" exceeding $1,000 for the purpose of influencing

the nomination or election of any person to federal office. Section 432(f) requires every candidate to name a principal campaign committee. Sections 432(c) and (d) require every political committee to keep an exact record of:

> (i) all contributions made to it in excess of $10 with the date, amount and name of the contributor and, if the contribution is more than $100, his occupation and principal place of business.
>
> (ii) all expenditures made by the committee including the date and amount of the payment, a statement of its purposes in the form of a receipted bill containing full particulars and the address of the payee.

The records are to be made accessible to the Federal Election Commission which is given the duty of auditing political committee reports. § 438(a)(8).

Section 434 requires each political committee and each candidate to file with the Federal Election Commission, at specified times, detailed financial reports showing assets, receipts, transfers to or from other political committees, and expenditures. The reports must include for each contribution in excess of $100 a statement of the amount and date of the contribution, the full name and mailing address of the contributor, and the aggregate amount of all contributions received from that contributor. On the expenditures side, the report must include a statement of all expenditures showing the amount, date and purpose of each, and the names of the payee and of the candidate on whose behalf the expenditure was made. Finally, the reports are to include a statement of debts and like obligations owed by or to the committee.

These provisions serve three purposes: First, the disclosure helps to provide voters with information relevant



to their ballots. Voters may judge that the sources of a candidate's financial support tell much about his outlook and qualifications. "Birds of a feather flock together." The knowledge that a number of underworld figures have each contributed just under the $1,000 ceiling to a candidate who is preaching vigorous law enforcement would help voters appraise his platform. Similarly, a candidate's attitude toward the issuance of stricter regulations designed to reduce air pollution by the Environmental Protection Agency might well be appraised in the light of the contributions he was disclosed to have received from the executives of large manufacturers of cement and oil refineries. The formal reports may not themselves be very meaningful to voters, but their availability to opposing candidates and a vigilant press will keep the voters advised about such relevant circumstances.

Second, disclosure of receipts and expenditures is a safeguard against the use of money for corrupt or dishonorable purposes. In some instances the very payments encouraged by absence of a duty of disclosure might be unlawful, as in the case of bribery of voters or election officials. Cf. *Burroughs* v. *United States,* 290 U.S. 534, 545 (1934). Other expenditures, though not illegal, may be of a character that many voters would regard as immoral or otherwise offensive. "Dirty tricks" designed to embarrass a candidate by putting him in a false light or to disrupt his campaign schedule or public rallies are one example; political espionage is another. The record-keeping and reporting provisions discourage such activities and increase the likelihood that, if they occur, they will be exposed and voters may take account of them. It is hardly necessary to add that the solicitation and funneling of political contributions to Hunt, Liddy and other original Watergate defendants would have been more difficult to accomplish clandestinely under the challenged legislation.

Third, the record-keeping and reporting requirements will deter violation and facilitate enforcement of the ceilings on contributions and expenditures. The man who might otherwise contribute an illegal sum (*i.e.* in excess of $1,000) will think twice when he knows that the recipient will be under a duty of reporting and disclosure. By requiring a few aggregate figures in addition to those specified in the statute, so as to show whether initial assets plus receipts balance with the expenditures plus assets remaining, the Federal Election Commission can also make the reports an effective means of deterring improper expenditures.

The purposes served by the disclosure provisions are plainly of such high public value as to make it unnecessary to consider whether the appropriate yardstick is best expressed by "compelling purposes" or by some less demanding phrase. The constitutionality of requiring disclosure of campaign contributions was sustained in *Burroughs* v. *United States*, 290 U.S. 534 (1934). Although *Burroughs* was decided prior to the recent development of legal doctrine interpreting the First Amendment, the continued vitality of its holding was reaffirmed in *United States* v. *Harriss*, 347 U.S. 612, 625-26 (1954).

Appellants apparently concede the constitutionality of disclosure laws as applied to the two major political parties but argue that the First Amendment prohibits their application to minor parties, new parties and independent candidates. The need for disclosure, as the court below observed (J.S. App. 1547), is no less in the latter instances. Disclosure is a means of providing the public with relevant information, of deterring corrupt election practices, and of implementing enforcement of the ceilings on financial contributions and expenditures, in the case of independent candidates and the candidates of minor parties just as much as in other cases. There is obvious fair-



ness in applying the same disclosure laws to all candidates and all parties. The need is the same in all cases (unless minor, new party and independent candidates are to be brushed aside under the maxim, *De minimis non curat lex*). Appellants' argument thus comes down to an assertion that requiring disclosure by new or minor parties, or by independent candidates, will do more to discourage their prospective contributors than potential Democratic or Republican contributors, because their contributors face greater risks of reprisal.

The argument is sheer guesswork. The few, scattered incidents incompletely described in the record do not approach the level of public harassment, much less the kind of "uncontroverted showing" of "economic reprisal, loss of employment, threat of phyiscal coercion, and other manifestations of public hostility" made in *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958). There is not the slightest evidence in the record that contributors to any political party in the United States, major or minor, new or old, or to any independent candidate, have been subjected to substantial public reprisals. Insofar as the hypothetical danger is supposed to be of political reprisal, there is no reason to suppose that one who is enjoying political patronage under a Republican administration will suffer more if he is discovered to be contributing money to the Conservative Party than if his gifts go to the Democratic Party. Anyone who engages in political activity risks some criticism or loss of friends. Although the record fails to show that any appellant suffered from such reactions, it seems proper to add that wider and more damaging public reprisal would be needed to invoke the First Amendment.

The Court has consistently held that such speculative hazards as appellants articulate are "too remote to require striking down a statute which on its face is otherwise

plainly within the area of congressional power and is designed to safeguard a vital national interest." *United States* v. *Harriss,* 347 U.S. 612, 626 (1954). See also *Lewis Pub. Co.* v. *Morgan,* 229 U.S. 288 (1913); *Viereck* v. *United States,* 318 U.S. 236 (1943); *United States* v. *Finance Committee,* 507 F.2d 1194 (D.C. Cir. 1974); *Stoner* v. *Fortson,* 379 F. Supp. 704 (N.D. Ga. 1974). The decisions holding disclosure requirements invalid under the First or Fourteenth Amendments are readily distinguishable. In *NAACP* v. *Alabama,* 357 U.S. 449 (1958), the State was unable to assign any reason for the enforced disclosure. In *Bates* v. *Little Rock,* 361 U.S. 516 (1960) ) and *Shelton* v. *Tucker,* 364 U.S. 479 (1960), the disclosure required went far beyond anything necessary to achieve the purposes assigned to the statute, even if they could have been regarded as compelling. The disclosure requirements should, therefore, be upheld not only against facial attack but insofar as their prospective application can be projected upon this record.

We press the argument no further than the record requires because it is possible, here as under a few other sections, to imagine situations in which enforcement of the disclosure requirements might raise a more difficult constitutional question. Occasionally, tiny political parties are founded and endure to support candidates without hope of election, as a means of voicing grievances and seeking support for causes so contrary to the dominant social or political current as to be repellent to the general public. The First Amendment protects such groups. Far out as they may seem in the beginning, one or more may become an important agent of reform. It is possible to imagine cases, therefore, in which the unpopularity of a political party *could* be so great that disclosure of the names of its financial supporters would subject them to risk of widespread public reprisal.



This case does not raise the question whether the reporting requirements would be constitutional as applied to those hypothetical circumstances. None of the appellants makes such a case. There is no reason to suppose that such a situation exists anywhere in the United States today in respect to any election affected by the FECA, as amended. Nor is there evidence of any likelihood that such a situation will come into being. Even if it be assumed that the disclosure requirements would be unconstitutional if applied in such circumstances, the resulting overbreadth would not render the provision unconstitutional on its face or as its operation is projected upon this record, for the reasons stated at pp. 62-63 above.

In this instance, moreover, the statute need have no chilling effect upon the exercise of First Amendment freedoms in any debatable area. The party faced with such unpopularity would not have to risk prosecution, nor would its potential contributors be required to disclose themselves, in order to raise the constitutional question. The party would have ample standing to raise the issue prospectively if it could show that the danger of reprisals was real. *NAACP* v. *Alabama,* 357 U.S. 449 (1958).

## III

### Public Financing of Campaigns For President of the United States Under the Federal Election Campaign Act Is a Constitutionally Permissible Remedy For Grave Public Evils.

The spiraling cost of federal election campaigns coupled with the candidates' need to look to private sources of financial support created grave public evils described earlier in this brief: the pressure upon candidates to obtain "big money" from contributors expecting repay-

ment in the form of governmental favors; the loss of public confidence in the integrity of the Executive and Legislative Branches as citizens observed large contributors obtain official rulings and other action beneficial to their financial interests; the narrowing of opportunities to be a candidate for office because wealth or access to wealthy supporters seemed necessary to mount effective political campaigns; and the increasing influence of big contributors upon the candidates.

Congress prescribed a tripartite remedy for these and related evils. One part imposes ceilings upon the size of contributions and expenditures in order to reduce the actual and apparent influence of money (see pp. 22-73 above). The second part requires detailed disclosure of contributions and expenditures within the statutory restrictions in order to discourage improprieties and provide voters with information relevant to their ballots. The third aspect is the substitution of public financing for most of the private financing in Presidential election campaigns, and the public supplementation of private financing of campaigns for nomination. Insofar as relevant to the constitutional issues, the plan operates in the following manner:

Section 9006 of the Internal Revenue Code establishes a Presidential Election Campaign Fund to which is appropriated in each fiscal year a sum equal to the number of individuals who indicate on their annual income tax returns, in accordance with Section 6096, a desire to have $1.00 of their tax liability used for that purpose. In 1976, the fund will apparently be adequate for all the payments described below.

*Election Campaigns.* Upon certification of the Federal Election Commission, the candidates of a major party for the offices of President and Vice President are entitled to draw from the Fund up to $20,000,000, the aggregate expenditure limit set by 18 U.S.C. §608(c).[51] In order to qualify the candidates must agree to incur no campaign expenditures in excess of the amounts that they receive from the Fund, to furnish information and submit to audits with respect to their expenditures, and to accept no money or loans from private contributors. 26 U.S.C. §9003. A major party is defined as one whose candidate received at least 25 percent of the vote in the last Presidential election. 26 U.S.C. §9002(6). Today only the Republican and Democratic Parties come within the definition.



Parties whose candidates for President and Vice President received between 5 percent and 25 percent of the vote in the preceding Presidential election are defined as minor parties. 26 U.S.C. §9002(7). Each minor party candidate may draw from the Fund a sum in the same proportion to $20,000,000 as the ratio between the vote of his party in the preceding election bears and the average of the votes for the major party candidates. 26 U.S.C. §9004(a)(2)(A). In addition, the candidates of minor parties are permitted to continue to raise and expend money from private sources without sacrificing public financial assistance. In further addition, after the election each minor party which receives a larger proportion of the vote than it received in the previous election may draw the additional sum due from applying the formula to its actual vote instead of the votes in the previous election. Minor party candidates, in order to be eligible for such payments, must agree to the same record-keeping and audits as major party candidates but the only restriction upon their receipt of contributions and

[51] The sum of $20,000,000 is to be adjusted for changes in the Consumer Price Index, 18 U.S.C. §608(d). The acceptance of public financing up to the ceiling does not exclude the national committee of a political party from raising funds by private contribution and making expenditures in connection with a Presidential election campaign in an amount equal to 2 cents per person of voting age, *i.e.*, approximately $2,800,000.

expenditures is that the aggregate expenditures, including any money drawn from the Fund, shall not exceed $20,000,000. 26 U.S.C. §§9003(a) and (c).

A new party or independent candidate is entitled to draw from the Fund according to the same formula after the election but only if he or she receives at least 5 percent of the votes cast. 26 U.S.C. §9004(a)(3).

*Conventions.* The provisions made in Section 9008 for public financing of nominating conventions follow lines parallel to those laid down for election campaigns. Section 9008(d) limits convention expenditures, in the absence of "extraordinary and unforeseen circumstances," to $2,000,000. Major parties may draw this sum; they may not increase their convention expenditures by drawing upon contributions or other resources. 26 U.S.C. §§9008(b)(1) and (d)(1). Minor parties may draw upon the Fund for convention expenses according to the formula used in computing their entitlements for the expenses of the election campaign. Minor parties are also free to raise additional funds for their conventions from private sources, subject to the universally applicable ceilings on the size of each contribution, and to make expenditures up to the same $2,000,000 limit applicable to all conventions. 26 U.S.C. §§9008(b)(2) and (d)(2).

*Nominating Campaigns.* Any candidate seeking nomination by a political party for election to the Presidency may qualify to receive contributions from the Presidential Primary Matching Payment Account.[52] 26 U.S.C. §9033(b)(2). To qualify the candidate must show that he has received private contributions in excess of $5,000 (counting only the first $250 of any individual's total contribution) in each of at least 20 States, 26 U.S.C. §§9033(b)(3) and

[52] This is a subaccount of the Presidential Election Campaign Fund.



(4); certify that he and his authorized campaign commitee will not exceed the expenditure limits applicable under Section 608(c)(1)(A)[53]; and agree to keep and furnish records and information requested by the Commission and to submit to an audit, 26 U.S.C. §9033(a). Each eligible candidate is entitled to public financing equal to the total amount of private contributions which he has received (again counting only the first $250 of any individual's total contribution).[54] §9034(a). Candidates are eligible for matching funds regardless of their party's nominating procedure, *i.e.*, primary elections, conventions or caucuses.

We submit that this plan for public financing of the cost of political campaigns is constitutional in every respect. We show below, first, that Article I, Sections 4 and 8 of the Constitution empower Congress to place a ceiling upon the expenditures that may be made by a candidate for election to federal office, and also to provide the money to pay for all or part of such costs. Second, we demonstrate that, contrary to appellants' argument (Br. pp. 145-152), the First Amendment does not bar any and all forms of public financing for election campaigns. Third, we turn to the particular program enacted by Congress and show that the formulas determining eligibility for public financial assistance under the FECA, as amended, satisfy the requirements of the First and Fifth Amendments.

[53] See pp. 80-81 above.

[54] These contributions must have been received on or after January 1 of the year immediately preceding the Presidential election with respect to which the candidate is seeking nomination. For purposes of this section and Section 9033, "contribution" includes only gifts of money made by a written instrument which identifies the person making the contribution. 26 U.S.C. §9034(a).

A. *Article I, Sections 4 and 8, Grant Congress Power To Provide Public Financing For the Cost of Federal Election Campaigns.*

Article I, Section 8 of the Constitution provides:

> The Congress shall have power to lay and collect taxes . . . to pay the debts and provide for the . . . general welfare of the United States . . . .

The words empower Congress to appropriate money for any *public* purpose which Congress believes will serve the general welfare. The ancient dispute over whether the spending power extends so far, or is limited by the regulatory powers of Congress, was resolved, first by history and later by this Court, in favor of the broader interpretation. *United States* v. *Butler,* 297 U.S. 1, 65-66 (1936); *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 586-587 (1937); *Helvering* v. *Davis,* 301 U.S. 619, 640-641 (1937). As Justice Cardozo observed in the opinion last cited, "The line must still be drawn between one welfare and another, between particular and general." Providing adequate public financing by which candidates for election as President of the United States may present themselves and their views to the electorate serves a general public purpose, especially when designed to replace the dependence upon private contributions which threatened the integrity of the government and the confidence of the people.[55] Appellants' argument (Br. p. 145) that the appropriations do not serve

[55] *See* Bulloch v. Carter, 405 U.S. 134, 148-49 (1972) where the Court observed: "Viewing the myriad governmental functions supported from general revenues, it is difficult to single out any of a higher order than the conduct of elections at all levels to bring forth those persons desired by their fellow citizens to govern."



the general welfare because the plan is bad for the country raises only a legislative question.[56]

Although the restrictions upon expenditures do not depend upon the public financing, the plan of public financing is keyed to the restrictions upon expenditures, especially the $20,000,000 ceiling upon the aggregate expenditures of any candidate (18 U.S.C. §608(c) ). The link casts no doubt upon the power of Congress to enact the combination because the restrictions are within the legislative powers of Congress. See pp. 22-24 above.

Nor does the unusual mechanism chosen to measure the amounts of the annual appropriation to the Fund cast doubt upon the validity of the plan. Each person liable for income tax is offered the annual opportunity to designate $1.00 for the Presidential Election Campaign Fund. 26 U.S.C. §6096. By Section 9006 of 26 U.S.C. Congress appropriates to the Fund for each fiscal year a sum equal to the total designations. The appropriation is like any other, save that the amount is determined by this measure of the extent of public support for the expenditure. The appropriation comes from the general funds of the United States. The money spent for this public purpose will not be available for any other. The burden of raising additional revenues will be distributed among all taxpayers. Just as these elements require the Court to treat the plan as one involving the expenditure of public funds rather than as a mechanism for distributing taxpayers' voluntary contributions, so in our view should these elements preclude a taxpayer from arguing that any part of the very dollar he designates will go to a party or candidate to whom

[56] The contrary *Opinion of the Justices,* 347 Mass. 797, 197 N.E. 2d 691 (1964) rests upon the peculiar ground that an appropriation must be spent by public officials. It is also worth noting that 80 percent of the money the Massachusetts legislature was proposing to appropriate would have gone to one political party. Recent Case, 78 Harv. L. Rev. 1260, 1261 (1965).

he is opposed. Even if this were incorrect, the taxpayer would have no constitutional complaint. As the court below observed (J.S. App. 1562), the taxpayer may freely choose not to make the designation, without incurring detriment.

B. *Public Financial Support for the Cost of Election Campaign Is Consistent with the First Amendment.*

Political campaigns are essential parts of the electoral process. Elections would be lotteries unless candidates were able to make themselves known, to lay proposed programs and policies before the electorate, and to debate personalities and issues. In the crowded modern world, full public attention requires the use of vehicles of mass communication. Such use costs money. One would suppose, but for the vehemence of appellants' argument, that any appropriation of funds with which to carry on the public discussion so vital to the conduct of representative self-government was plainly consistent with both the words and spirit of the First Amendment, provided that there was no interference with what was said or not said, with who might speak, or with the form of expression.

The public financing provided by FECA cannot be faulted upon the latter ground. There is not the slightest tendency to influence who speaks, what any speaker says, or how or when he says it.

Appellants' suggestion (Br. 145-46) that "such programs have almost always been accompanied by various measures of control and surveillance," quoting *Lemon* v. *Kurtzman*, 403 U.S. 602, 621 (1971), tears out of its context an accurate commentary upon the history of subsidies to religious institutions, and applies the words to a different area in which there has been no such experience. As applied to this case, the suggestion is answered by the plain words of the Act. The payments are nowise tied to any measure



of control or surveillance, except to confine reimbursement to the costs of an election campaign for which private funds could be lawfully expended. Justice Holmes provided the short answer to the claim that public financing will lead to censorship and government control of political parties so inexorably as to require the Court now to invalidate financing free from such interference: "Not while this Court sits." *Panhandle Oil Co.* v. *Knox*, 277 U.S. 218, 223 (1928) ("The power to tax is not the power to destroy while this Court sits."). See also *Cole* v. *Richardson*, 405 U.S. 676, 686 (1972).

The distinctions between this case and the cases involving aid to religion begin with a clear difference in the governing words. The interdiction respecting religion reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Under the Establishment Clause, "[n]either a state nor the Federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947). With respect to speech, the First Amendment provides only that Congress shall make no law "abridging the freedom of speech, or of the press." There is no Establishment Clause applicable to speech or political activity. The interdiction against abridging freedom of speech cannot be read to imply that the government shall not enlarge freedom of all speech by promoting its exercise.

Second, the Establishment Clause and the decisions giving effect to it derive from a distinct historical experience. From persecutions and prosecutions for heresy, from trials for witchcraft and experience under State religions, the Framers of the First Amendment learned that the religious beliefs of men and women, the ways in which they worship and whether they worship—indeed, all aspects of religious activity or inactivity—must be isolated from every form

of government intervention as matters of wholly private, personal concern. See *Everson* v. *Board of Education*, 330 U.S. 1, 8-15 (1947). "Render unto Caesar the things that are Caesar's and unto God the things that are God's."

Political election campaigns are inseparable parts of the processes of representative self-government. Their vitality and integrity are matters of profound public concern. Where the Establishment Clause and history conjoin to teach that the government shall not promote religion because the domain of religion should be set aside as a garden in the wilderness, neither admonition nor experience suggests that the public may not provide the means of conducting that fullness of political debate necessary to the preservation of representative government.

History is filled with examples of federal legislation giving financial encouragement to the exercise of freedom of expression. For many years "newspapers and other periodical publications" as well as books and other educational materials have been carried at subsidized postal rates. 39 C.F.R. §132.2(a)(1), formerly 39 U.S.C. §4354(a). Today the government provides financial assistance to the Corporation for Public Broadcasting. 47 U.S.C. §§390-96. Professor Zechariah Chafee, Jr., an ardent defender of all First Amendment freedoms, observed:

> Just as unrestricted freedom of locomotion would be useless without streets and roads, so when communication passes beyond a conversation in a small group, somebody must provide means for reaching hearers, readers, or other consumers. Often the state or some other governmental agency is best fitted to supply the essential facilities. Chafee, *Government and Mass Communications* 479 (1947, repr. ed. 1965).



Appellants slide over the critical distinction between public aid to the conduct of election campaigns and public aid to a particular party or belief. We accept, for the purposes of this case,[57] the observation in the second flag-salute case that the purpose of the First Amendment is to reserve the "sphere of intellect and spirit . . . from all official control." *Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943). Similarly, we accept the views expressed by Justices Black and Douglas in *Machinists* v. *Street*, 367 U.S. 740, 778, 788-91 (1961) and *Lathrop* v. *Donohue*, 367 U.S. 820, 871, 882-83 (1961) to the effect that the individual cannot be compelled to finance the propagation of ideas or political causes with which he disagrees. Neither proposition is relevant to the instant case. Unless the allocation is biased, the FECA financing, viewed as a whole, goes not to any particular candidate, or party, or political opinion, but to promote the process of public deliberation prior to balloting. To treat public financing as if public funds went only to one candidate or to a succession of isolated candidates without looking to the combined, overall function of the spending is to misconceive both its purpose and effect.

### C. *The Formulas For Determining Eligibility For Public Financial Assistance Satisfy the First and Fifth Amendments.*

In examining the present challenge to the particular plan for public financing of campaigns for nomination and election of the President of the United States, the Court should be guided by two propositions: first, Congress may provide such aid if the distribution formula draws no ideological lines and is sufficiently fair and general to constitute sup-

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[57] At least one scholar has criticized the observation. See Howe, *The Garden in the Wilderness* (1965) 110-115.

port for the process of political debate rather than particular parties, candidates or ideologies; second, any rule of distribution which accords every party or other political group substantially equal treatment in relation to its political needs and potentials violates neither the First nor Fifth Amendment.

### 1. *Presidential Elections*

In framing the FECA provisions relating to the financing of the Presidential election campaigns, Congress had four objectives:

(1) to provide for full public disclosure of, and debate upon, candidates and issues; but, once that was assured, to stop the spiraling expenditures which generated personal and party obligations corrosive to the integrity of government;
(2) to relieve candidates and their supporters of the need to raise funds from private contributors by substituting public financing insofar as practicable;
(3) to avoid wasting public funds and diverting attention away from the serious candidates to others without any significant chance of winning the election; and
(4) to treat all candidates equally in the sense that the allocation of public financing, when coupled with other parts of the statutory program, should neither aid nor handicap one party or candidate in relation to any other.

It is probably impossible to achieve 100 percent of all four goals without creating other more serious problems. We submit that Congress achieved enough of each objective, and struck a fair enough balance between conflicting objectives, to satisfy the most exacting constitutional test.



The first step in the accommodation was to subject every party to the $20,000,000 ceiling upon expenditures. 18 U.S.C. §608(c)(1)(B). Each major party is then offered the opportunity to give up its opportunity to raise campaign funds by private contribution in return for $20,000,000 from the Presidential Election Campaign Fund.[58] In the absence of any statutory restriction, both major parties would have power to raise and spend an additional $10,000,000, $20,000,000 or even $50,000,000.[59] The major parties are thus subjected to the same constraints and receive the same benefits. Although a theoretical argument can be constructed to the effect that this allocation alters what would be the relative positions of the major parties in respect to campaign financing in the absence of the FECA, history shows that for 116 years the man elected President has been nominated by one of the major parties.[60] There have been many close elections and shifts in ascendancy. Under these circumstances, it is surely fair and equal to provide the same public support to both parties, thus assuring the body politic that greater spending power will not determine the outcome of an election. The considerations which led Congress to look to a minor party's earlier vote in order to measure its fair subsidy are not applicable under these circumstances.

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[58] See p. 81, n. 51, above.

[59] In 1972, the Republican Presidential candidate spent a total of $55,000,000 in seeking his party's nomination and running for reelection. The Democratic candidate spent $38,200,000 in his primary and general election campaigns. (Finding II, ¶ 51, II J.A. 451.) In 1968, the Republican candidate spent $29,000,000 in the general election alone. The Democratic candidate spent $13,600,000. (1969 Cong. Q. Almanac 1200.)

[60] The figures used in discussing the popular vote in past presidential elections are taken or computed from tables in Schlesinger (ed.), *The Coming to Power*, pp. 498-533 (1971).

The difficulty in determining what financial support should be offered to minor parties and new parties is that they have never approached equality with the major parties in their ability either to raise and expend campaign funds or to win Presidential elections. Major parties have manifold greater significance in these respects because of their relative continuity, their strength in all parts of the country, their roles in State elections, and their vastly larger membership and more numerous supporters. No Presidential candidate nominated by a major party or new party has ever been elected.[61] Minor party and new party candidates have never come close since 1856, unless one counts the elections of 1860 and 1912 in which there were splits in a major party.[62]

Current conditions and history thus conjoined to teach the inappropriateness of granting identical financial support to all parties. "The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization, on the other . . . Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness* v. *Fortson,* 403 U.S. 431, 441-42 (1971). Identical treatment, as the court below observed, "would not only make it easy to raid the United States Treasury, it would also artificially foster the proliferation of splinter parties" (J.S. App. 1563), by radically altering the relative positions of the candidates in the absence of public financing. This Court has recognized on several occasions the important public interest in protecting the political processes against this kind of distraction. *Storer*

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[61] Political organization was so fluid in 1824 as to preclude any generalization about "party" strength.

[62] See pp. 100-01 below.



v. *Brown,* 415 U.S. 724, 736 (1974); *Bullock* v. *Carter,* 405 U.S. 134, 145 (1972).

At the same time, the congressional sponsors of the FECA were fully appreciative of the importance of preserving the potential fluidity of American political life. New and minor parties contribute ideas and influence the course of events to a greater extent than mere membership rolls might indicate. Change and growth require that every new party have a fair chance to move to the foreground and establish itself as a major influence, as did the Republican Party in 1856 and 1860. It would also be inconsistent with the policy of the First Amendment for government to influence more than marginally the relative strength of political candidates, ideologies, or groups, and then only if compelled by some paramount objective.

These desiderata pull in different directions. Various accommodations are conceivable. A number were considered by Congress.[63] The solution chosen has three parts. First, Congress left minor parties and new parties free to raise campaign funds from private sources and spend them up to the full limit of their power, subject only to the fair possibility that one might reach the ceiling of $20,000,000. Next, Congress *increased the spending power of every minor party* by providing a financial supplement—not a substitute as in the case of major parties—from the Fund. As a minimum, the minor party is entitled to a sum bearing the same proportion to the $20,000,000 available to each major party that its vote in the last Presidential election bears to the average of the votes of the major parties. Further, in an effort to provide for a situation in which some minor party's true strength in a new election is substantially greater than in the past, the statute stipulates that a minor party which secures a larger percentage

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[63] See e.g., S.1760, 94th Cong., 1st Sess. (1975) (voucher plan); S.1954, 93d Cong., 1st Sess. (1973) (petitions).

of the average vote of the major parties in the new election than it received in the old shall be entitled to additional payments from the Fund up to the sum due under the new proportion. Although the dollars paid after an election in proportion to votes then won cannot be spent in the effort to win them, any major increase in a minor party's strength would normally be discernible as the election campaign progressed and the party should find it easier to increase its spending by borrowing or obtaining credit against the prospective payments.

New parties and independent candidates receive no advance payments from the Fund but do receive payments after the election whenever their respective candidates poll more than 5 percent of the votes cast.

These provisions create no inequalities. So far as the future can be predicted, the candidates of minor and new parties will have a financial power under the FECA which, when compared with the power of the major parties, is proportionately greater than it would be in the absence of legislation. Under FECA a major party receives $20,000,000 in substitution for the ability to raise and spend much more than that sum. The minor aprty receives a payment proportionate to its probable significance measured by the electoral vote in the last election *plus* the sums which it can raise and spend from private sources *plus* the guaranty of a further sum after the election, if deserved, in order to make its subsidy proportionate to its actual electoral significance. Although statistical measurement is impossible because of the short lives and trifling significance of most minor parties in the political history of the United States, it seems quite plain that, when the package of financial opportunities allowed minor parties is compared with the $20,000,000 to which the major parties are limited, any minor party will be proportionately better off financially than minor parties were before.



Nothing in the First or Fifth Amendment establishes a rule requiring Congress to choose between retaining the system of private financing of political campaigns and giving every party or candidate the same sum of money. "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike. . . ." *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971). Congress, like the State of Georgia in *Jenness*, was free to take into account the "obvious differences in kind between the needs and potentials of a political party with historically broad support, on the one hand, and a new or small political organization on the other." *Id.* at 441. There is no invidious discrimination in a plan of regulation and public financing which, so far as can be predicted, leaves the new or small organizations relatively as well or better off than before. Any slight risk that a minor party will lose financial power relative to a major party because of some unforeseen circumstance is amply justified by the interest in avoiding public expenditures serving chiefly to promote frivolous candidacies and splintered parties or unrestrained factionalism. Cf. *Bullock* v. *Carter*, 405 U.S. 134, 145 (1972); *Storer* v. *Brown*, 415 U.S. 724, 736 (1974); *American Party of Texas* v. *White*, 415 U.S. 767 (1974).

More detailed analysis of the separate elements of the FECA plan confirms the foregoing conclusions. The statutory formula for the pre-election allocation of public funds to minor parties was consciously based upon the Court's approval in *Jenness* of a system which based differential treatment upon demonstrated relative strength in prior elections. S. Rep. 93-689, p. 9. The aim, as stated above, was to give financial support in a way which would most nearly reflect the candidate's actual significance as an election factor, thus minimizing governmental influence upon the outcome of the election. The distribution formula takes the minor party's percentage of the vote in the previous

election as the principal determinant. There is probably room for rational argument about whether the vote secured by a party four years earlier is the best measure of a candidate's current significance. The difficulty, as the court of appeals recognized, is that other measures are either subjective or more chancy. To allow a government agency to judge any political party's strength or importance, except when anchored to unmistakable statistical benchmarks, carries obvious dangers. Polls are too chancy, especially polls taken early in an election year. To distribute vouchers to be assigned by individual voters might possibly prove workable but, again, the risks are high: How many voters would actually make assignments? How many would make assignments in time to finance campaigning? What are the dangers of a race to be the first fund raiser for a candidate to make a personal approach? How would the expenses of that solicitation be met? How responsibly would voters handle such "phoney money?" What are the dangers of a "black market?" In the face of such uncertainties, it is impossible to say with any assurance that Congress could have found a more reliable yardstick for measuring a minor party's initial entitlement to public financial support.

The risk of error in thus estimating the significance of minor and new parties' candidates is reduced by Section 9004(a)(3), which provides still further post-election payments to those minor party candidates who obtain at least 5 percent of the popular vote and demonstrate greater electoral significance than they had four years before. In such a case, the total payments will reflect the actual proportion of the vote won. The payment cannot be spent in advance, just as the candidate's electoral strength cannot be known in advance, but any substantial increase in popular support should be at least partially evident early enough in the campaign to increase the financial strength



of the new or minor party by facilitating borrowing and obtaining credit.

The value of the potential pre-election and post-election payments to minor party candidates and of the potential post-election payments to new party candidates is not to be judged as if they were such candidates' only financing. Where major party candidates must forego private financing in exchange for the smaller $20,000,000 payment, new party and minor party candidates may use any public financing to which they are entitled in addition to private financing. Although they are theoretically subject to the $20,000,000 ceiling, there is not the slightest indication that any will ever achieve it. The ceiling operates, on the other hand, to prevent the major parties from enjoying their full power to raise and spend money from private sources. This difference greatly strengthens the relative financial position of new and minor party candidates under the FECA as compared to what it would be in the absence of legislation.

It is difficult to find historical examples by which to demonstrate these generalizations. New parties and minor parties have much too rarely been significant factors in Presidential elections. However, a few facts are worth noting.

(1) The only newly-formed party to move to the front in a field of established parties and elect its nominee as President was the Republican Party, which elected Abraham Lincoln in 1860. For that election it would have been a "major party" under Section 9004(a)(1) because of its large vote in the 1856 election. In 1856 the Republican candidate would have qualified for post-election financing equal to the sums already received by the Democrats and Whigs, but not for pre-election payments unless the Republicans could have claimed as successors to the Free Soilers, who would have qualified as a minor party in 1848.

(2) The Populists won approximately 9 percent of the popular vote in 1892. The Populist candidate would have qualified for just under 10 percent of the subsidy available to the two major parties in 1896, in addition to his private financing.

(3) In 1924 the Progressive Socialists would have received 17 percent in arrears and, if the party had survived, their 1928 candidate would have been entitled to that payment in advance of the election, in addition to his private contributions.

(4) No new or minor party ever received 5 percent of the popular vote in any other election, except in 1968.

(5) Beginning with the 1968 election it is possible to make a rough comparison of actual financial support with a projected operation of the FECA plan. In that Presidential election campaign the Republican candidate actually spent $29,000,000; the Democratic candidate spent $13,600,000; and the American Independent Party candidate spent $7,200,000 (1969 Cong. Q. Almanac 1200). Application of the FECA expenditure ceiling, by itself, would have improved the relative financial position of the American Independent Party candidate *vis a vis* the Republican. The actual expenditure ratio was approximately 1:4, the ceiling would have reduced the disadvantage to 1:3. The ceiling alone would not have altered the relative spending power of the Democratic and American Independent candidates. The American Independent candidate would also have been entitled to an additional $6,200,000 after the election, assuming that he had expended such a sum, thus bringing his total funding to $13,400,000—a tremendous gain relative to both the major parties. In actuality, the total expended could hardly have been so high because it is unlikely that the American Independent candidate could



have borrowed or received credit against the full sum to which he proved entitled after the election. Still, even if the figure is severely discounted, it seems plain that the FECA would have greatly improved the American Independent candidate's relative financial position.

Although the American Independent Party did not nominate a widely-known candidate in 1972, one can get further insight into the probable operation of the FECA plan by projecting its 1968 record into 1972. In 1972 the Republican Party spent $55,000,000. Since there was no real contest for the nomination it is fair to assume that at least $40,000,000 was spent in the general election exclusive of the cost of fund-raising. If the American Independent Party had again raised the $7,200,000 of 1968, the Republican Party would have outspent it by more than 5 to 1. Under the FECA the ceiling imposed by Section 608(c) would alone have cut the advantage to 3 to 1. Under the FECA each of the two major parties would have received $20,000,000 in public financing. The American Independent Party candidate would have been eligible, by virtue of its 1968 record, to $6,200,000. In addition, the American Independent candidate was entitled to raise and spend private contributions. The ceilings upon gifts from a single source might have reduced the aggregate below the $7,200,000 raised in 1968, but even if the figure were as low as $4,000,000, the American Independent Party candidate would have had half the spending power of a major party.

We do not offer these figures as anything more than an effort to check the FECA plan against such examples as can be derived from history. Such hypothetical compari-

sons involve assumptions and uncertainties. Nevertheless, even when allowance is made for the speculative elements, the examples confirm the conclusion also to be drawn from abstract analysis—that the total effect of the FECA upon Presidential campaigns is to improve the relative financial position of new parties and especially of minor parties, partly because of the limit upon major party expenditures and partly because a minor party, unlike a major party, receives public financing in addition to what it can raise by private contribution.

History requires us also to add a word of caution. The elections of 1860 and 1912 exhibit situations which do not conveniently fit the FECA structure. In 1860 the Democratic Party split into Northern and Southern wings; the Constitutional Union Party perhaps included other fragments. The Republican Party split in 1912 in every substantial sense, although the Taft wing kept the party apparatus and name, and the Roosevelt wing became the Progressive Party. The FECA makes no express provision for such events. It seems unlikely that Congress desired to have the Federal Elections Commission decide in such circumstances which wing is the true party and give its candidate the entire $20,000,000 while providing no funds to the candidate of the other. Perhaps the problem can be solved, if it should ever arise, by a new rule or regulation of the kind that the Federal Election Commission is authorized to prescribe under Section 9039 of the Internal Revenue Code. The best solution would be to make full financing available to both wings of a divided party, thus avoiding any risk of unduly influencing an election. If this solution is not authorized, then there is a gap in the statute with which Congress will have to deal if the occasion should arise.



In dealing with reforms of great magnitude, neither the Congress nor the Court can foresee every possible eventuality. Conditions may develop in which further amendment of the FECA is essential to fairness. Legislation which embraces a major new departure because of pressing dangers under the old regime almost always requires modification or refinement as new facts develop. The Court is not required to test the Act against every conceivable situation; it rules upon constitutionality in the circumstances shown by the record. Under these circumstances and any which can be projected for the immediate future, the FECA ceilings and provisions for financial support in Presidential election campaigns work no unconstitutional discrimination. Should a new situation arise and Congress or the Federal Election Commission, acting within the scope of its delegated authority, fail to make adjustments, the Court can rule upon the case then presented. The decision here would not govern the constitutionality of the statute under the new conditions. *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543 (1924).[64]

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[64] Appellants pose on pp. 153-54 of their brief a hypothetical example in which Party A received 50 percent of the prior vote, Party B, 25.1 percent and Party C, 24.9 percent. The example is too abstract to be meaningful because we are told absolutely nothing about the organization, previous history and present circumstances of the three parties. The one absolutely certain thing is that all political history shows that Congress had no cause to concern itself with so theoretical a possibility, unless there was a true split in a major party. Neither a minor party nor a new party has come near to 25 percent of the vote for more than a century. Should the improbable occur, Congress and, if necessary the Court can face the new condition.

In appraising not only the 25 percent line but all others, it is appropriate to recall Justice Holmes' observation in Louisville Gas Co. v. Coleman, 277 U.S. 32, 41 (1928) (dissenting opinion).

### 2. *Conventions*

The court of appeals correctly upheld the constitutionality of the allocation of public funding for party conventions according to the same formula used for distributing pre-election funds for Presidential election campaigns. Appellants' statement that these "federal subsidies will help widen the gap between major parties and all other political groups" (Br. p. 169) has no foundation in fact. Like appellants' other attacks upon public financing, the argument makes an altogether false comparison by ignoring half the statutory plan.

The major parties will each be eligible for $2,000,000 in federal funding. 26 U.S.C. §9008(b)(1). Since each is also prohibited from spending more than $2,000,000 for its convention, the subsidy is in substitution for much larger private spending. Any new party or minor party is free to raise and spend private funds in addition to any public funding to which it may be entitled. Contributions for this purpose will not even be subject to the $1,000 ceiling upon individual gifts. 18 U.S.C. §608(b)(1). A degree of effort which is not reducible to monetary terms may be required to raise the private contributions, but, even after allowance for this factor, it seems quite plain that the net effect is to make the new parties and minor parties relatively better off in their ability to equal the convention spending of major parties than they were before.

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When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.



### 3. *Campaigns for Nomination*

The FECA greatly enlarges the opportunities for candidates to seek nomination for election to the Presidency despite their lack of wealth or access to wealth by providing matching grants for candidates who have qualified by showing that they have received contributions aggregating at least $5,000 from the residents of each of 20 States, counting only the first $250 of each contribution. 26 U.S.C. §9033(b). Every candidate is subject to an aggregate expenditure ceiling of $10,000,000. 18 U.S.C. §608(c)(1)(A). These provisions help the candidate who can reach the threshold in two ways: (1) they prevent the more powerful money-raiser from greatly outspending the less by spending far above the ceiling; (2) they double the money available to the less effective money-raiser in contributions of $250 or less. The entire thrust of the measure is thus to reduce the financial barriers to effective candidacy—a step in keeping with constitutional trends. Cf. *Harper* v. *Board of Elections*, 383 U.S. 663 (1966); *Bullock* v. *Carter*, 405 U.S. 134 (1972).

The eligibility requirements are designed to confine the federal subsidy to those candidates who have such serious support of their own as to give them a significant chance of winning nomination. Ability to raise funds and to attract popular support is not only an important measure of a candidate's potential but a more reliable guide than any other available (such as the artificial taking of polls). To concentrate the public funds upon the serious candidacies avoids encouraging "frivolous or fraudulent candidacies" and "splintered parties and unrestrained factionalism." *Bullock* v. *Carter*, 405 U.S. 134, 145 (1972); *Storer* v. *Brown*, 415 U.S. 724, 736 (1974). The principle applies with greater force in the context of public spending than in the regulation of the political system because its appli-

cation in the former sphere nowise restricts the ability of the minor group to promote its ideas and interests without government interference.

The requirement that support come from 20 States is not invidiously discriminatory in the context of Presidential elections, for it too is a rational measure of the importance of a candidacy. Presidents, unlike State-wide officials, are not chosen by counting equally all the popular votes. A Presidential candidate, in order to have a serious chance of election, must have support in various geographical sections. This requirement is likely to be at least as important in obtaining nomination as it is in the general election. *Moore* v. *Ogilvie*, 394 U.S. 814 (1969), is distinguishable not only upon this ground but because the evident purpose of requiring signatures on nominating papers from 50 of 102 counties was to bar formation of a new political party without support in rural counties containing less than 7 percent of the voters. The present 20 State requirement is but a modest and reasonable measure of whether the candidate has more than local political recognition and support.

In criticizing the statutory method of gauging the relative support for candidates as discrimination in favor of the wealthy (Br. p. 167) appellants resort to semantic and statistical confusion. The effect of the progressive income tax is irrelevant here. The criterion of eligibility is "wealth" only in a very special sense, because the reference is to campaign funds raised from a very wide circle of supporters. Such words as "the wealthy" and "wealthy persons" are also misleading because they divert attention from the fact that only the first $250 of any contribution counts in determining eligibility and the amounts of matching funds—a limitation that links the matching payments to the number of supporters serious enough to give modest financial assistance to the candidate of their choice.



When the adjectives are stripped away, the fact remains that the candidate for the nomination who has wide popular support among those citizens who can donate $250 apiece will receive aid proportionate to that support, whereas the imaginary candidate who is supposed to have equal present and potential support among citizens who cannot afford the contributions receives nothing. The difference might not be tolerated in an ideal world of perfect political "equality," where equality was measured without regard to ability to raise or contribute funds, and in which there was perfect ability to test such suppositions of wide political support. Given the existing political system, the matching payments do not wipe out, but plainly tend to reduce inequalities of opportunity due to differences in fund-raising capacity, especially the inequalities due to differences in ability to raise large contributions. The allocation of funds according to the statutory formula will almost surely increase the proportionate spending power of the serious candidates with the least fund-raising ability in relation to their initial popular support—if they can cross the threshold—because candidates with large spending power in relation to their initial popular support obtain a good part of their funds from large contributions. The imaginary candidate with popular support but no ability to raise funds is unlikely to find himself worse off than before. If he could win before, despite his lack of funds, he can win without them under the statute. He is better off under the statute relative to the "big spenders" because the ceilings limit their spending. At worst, he loses some marginal chance that he might have won the nomination instead of a candidate whose success is attributable to funds which that candidate would not have had without the public subvention.

A reform measure that moves strongly in the direction of eliminating the consequences of economic disparities is

not unconstitutional merely because some of life's unfairnesses remain uncured. *Katzenbach* v. *Morgan,* 384 U.S. 641, 657 (1966); *Schilb* v. *Kuebel,* 404 U.S. 357, 366, 372-73 (1971) (majority and concurring opinions); *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 54-5 (1973). The case in which the FECA plan might increase inequality of opportunity because of differences in fund-raising ability is wholly hypothetical. Were the risk real, it would be more than justified by the public interest in the long stride the plan for matching payments takes toward generally greater equality of opportunity in seeking nomination, and in promoting public discussion of serious candidacies.

## IV

### The Federal Election Commission Was Established in Accordance With the Constitution and May Constitutionally Perform the Functions Thus Far Undertaken.

The establishment of a permanent, independent Commission, charged with broad oversight of political campaigns for election to federal office, is an institutional development of prime importance not only for implementing the Federal Election Campaign Act, as amended, but for promoting further reforms. The Commission will not only bring continuous study to bear upon developing problems which may require new legislation on the part of Congress and the President. It will have certification and auditing duties in public financing of Presidential elections, and will also serve as the depositary of the FECA reports upon contributions and expenditures designed for the information of the public. By its interpretations and regulations under the FECA it will facilitate compliance, close



interstitial loopholes, and avoid unnecessary unfairness in the practical operation of novel legislation.

The legal challenge to the establishment of the Commission rests upon the assertion that the method of appointing its members is unconstitutional. Section 437c of Title 2 of the United States Code provides that the Commission shall have eight members, two of whom shall be the Secretary of the Senate and the Clerk of the House of Representatives *ex officio,* two of whom shall be appointed by the President of the United States, two by the President *pro tem.* of the Senate upon recommendation of the majority and minority leaders, and two by the Speaker of the House of Representatives upon the recommendation of the majority and minority leaders, but the last six confirmed by a majority vote of each House of Congress. Appellants argue that the members of the Commission are "officers of the United States," and that the foregoing method of appointment therefore violates Article II, Section 2, Clause 2 of the Constitution, which provides that the President—

> shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

We agree with the Attorney General (Br. pp. 110-111) that the issue cannot be solved as a problem of nomenclature. From the beginning the approach to questions concerning the separation of powers generally, and the

appointment and removal of officers in particular, has been flexible and pragmatic. Note, *Power of Appointment to Public Office Under the Federal Constitution,* 42 Harv. L. Rev. 426 (1929). New institutions of government have developed as new times produced new problems, subject only to the fundamental necessity of maintaining the essential balance of the three departments and preventing one from taking over functions falling exclusively in the core of power belonging to another. As Justice Holmes observed in *Springer* v. *Philippine Islands,* 277 U.S. 189, 209-211 (1928) (dissenting opinion), "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to another . . . . When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on . . . . It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments. . . ."

Accordingly, the answer to the question whether the Federal Elections Commission was established and its members appointed in violation of the Constitution is to be found in study of the functions assigned to the Commission and its relation to other arms of government, the occupants of other offices, and the political system as a whole.

We divide the inquiry into two parts. We show, first, that the Commission exercises a number of important functions not belonging exclusively to the Executive Department but appropriate for an independent arm of government exercising quasi-legislative power. We then demonstrate that the Constitution does not forbid dividing the authority for selecting members of this truly independent Commission among the President and the highest officers of the Senate and House of Representatives in order to build the greatest public confidence in its complete impartiality and freedom from influence in performing its unique duties in scrutinizing the political campaigning of the President and members of Congress, and in disbursing public funds in Presidential elections.



We do not examine a number of duties assigned to the Commission, such as making recommendations for criminal prosecutions and instituting civil enforcement actions. Whether they are so essentially executive in character as to belong exclusively to the Executive Department need not be decided in this case. Since the Commission was established in accordance with the Constitution to exercise a core of power which Congress and the President could lawfully confide in its members by enacting the measure and signing it into law, decision upon the delegation of other powers, not yet exercised, may be postponed. It cannot matter to any of the appellants whether enforcement involves the Commission or is reserved only to the Executive.

A. *The Commission Exercises Important Functions Not Belonging Exclusively to the Executive Department But Appropriate for an Independent Agency With Quasi-Legislative Powers.*

Although there may be room for controversy over whether some of the functions assigned to the Commission are properly prerogatives of the Executive Department, its major duties are of kinds never regarded as belonging exclusively to that Department and often per-

formed by other arms of government free from Executive control and variously described as "legislative" or "independent."

1. *Investigations and Reports.* The Commission is given wide power to conduct investigations, direct studies and make legislative recommendations. 2 U.S.C. § 437d, 26 U.S.C. §§ 9009, 9039. The power extends beyond the financing of political campaigns to "the administration of elections." 2 U.S.C. § 438(b). Since these duties might be delegated to an independent agency, a committee of Congress or even congressional staff, there is no room for constitutional challenge to the assignment to the Commission.

2. *Depositary of Reports of Contributions and Expenditures.* One of the Commission's major duties is to serve as the depositary of all reports required of contributors, political committees, and candidates for federal office disclosing receipts and expenditures. In order to facilitate compliance, the Commission is charged with developing forms for reports and record-keeping. It is also charged with conducting audits and investigations, in order to bring apparent violations to the attention of the Executive Branch and to inform Congress upon the operation of the Act and any need for amendment. Because a primary purpose of the reporting requirements is to inform the public, the Commission is directed not only to make the reports public but to develop mechanics for filing, indexing and copying which will facilitate publication. 2 U.S.C. § 438.

History and reason indicate that although these duties could properly be assigned to executive officials appointed by the President, they are also allocable outside the Executive to an officer or agency created by Congress. Duties essentially similar to the Commission's responsibilities as depositary of reports concerning campaign finance have been vested in officers of the Senate or House



of Representatives for almost three quarters of a century. The Corrupt Practices Act of 1910, 36 Stat. 822, required political committees to keep records of all contributions and expenditures for filing with the Clerk of the House after the election. The legislation was broadened in 1911 and the Secretary of the Senate was given duties paralleling those of the Clerk. 37 Stat. 25. The Corrupt Practices Act of 1925, 43 Stat. 1070, greatly elaborated the reporting and disclosure requirements and imposed expenditure limitations in campaigns for Senator and Representative. The details are unimportant except to point out that once again the Secretary of the Senate and the Clerk of the House were assigned key roles. Primary responsibility for enforcement of the expanded reporting and disclosure provisions of the Federal Election Campaign Act of 1971, 86 Stat. 3, was vested in the Secretary, the Clerk and the Comptroller-General.

The foregoing statutes were enacted at different Congresses and signed by a number of Presidents. The constitutionality of the Corrupt Practices Act of 1925 was litigated and upheld without any suggestion of constitutional impropriety in designating officers in the Legislative Branch as depositaries of the required reports even in the case of a Presidential election. *Burroughs* v. *United States,* 290 U.S. 534 (1934). Consistent practice, in which all branches of the government have acquiesced, shapes the applicable constitutional law in an area where little guidance can be found in the words of the instrument. *Stuart* v. *Laird,* 1 Cranch 299, 309 (1803); *Lithographic Co.* v. *Sarony,* 111 U.S. 53, 57 (1884); *Ex parte Grossman,* 267 U.S. 87, 118-119 (1925).

There is an additional reason for not regarding the receipt and scrutiny of financial information relating to campaigns for election as Senator or Representative as duties belonging exclusively to the Executive Department.

Article I, Section 5 of the Constitution makes each House "the judge of the elections . . . of its own members." The receipt of reports concerning financial practices is closely related to that constitutional duty.

3. *Duties in Public Financing of Presidential Elections.* The Commission is a primary administrator of the public funding of Presidential election and primary campaigns under Chapters 95 and 96 of the Internal Revenue Code, 26 U.S.C. §§ 9001 *et seq.* The Commission certifies to the Secretary of the Treasury the names of those who have complied with the statutory conditions for eligibility and the amounts due; it also conducts audits and sees that overpayments or improperly spent funds are returned to the Treasury.

In order for a Presidential candidate to receive public funds, he must agree in writing to furnish the Commission with evidence of his campaign expenses, to keep and furnish records, to submit to Commission audit, and to make any required repayments where necessary. 26 U.S.C. § 9003(a). Presidential candidates of major parties who seek federal financing must also certify to the Commission that they will not incur campaign expenses in excess of the amount of federal funding received and that they will not accept private financing. The Commission is to designate the time when such certification must be made. 26 U.S.C. § 9003 (b) and (c). If candidates submit the required agreements and certifications, the Commission is, in turn, to certify their eligibility for payment to the Secretary of Treasury, who is charged with the actual disbursement of the authorized funds. 26 U.S.C. §§ 9005, 9006(c). The Commission has no role in determining the amounts paid to eligible candidates, such amounts being fixed by law. 26 U.S.C. § 9004.

The FECA also provides for federal financing of Presidential nominating conventions and of Presidential



primary campaigns. The Commission's certification duties with respect to these payments are similar to its duties relating to Presidential campaigns. 26 U.S.C. §§ 9008(g), 9033, 9036, 9037.

Once payments of federal funds are made pursuant to the above provisions, the Commission has the responsibility of auditing the expenses of Presidential candidates and others who receive these funds, 26 U.S.C. §§ 9007(a), 9009(b), 9038(a), 9039(h), and may, to this end, require the keeping of appropriate records, 26 U.S.C. §§ 9009(b), 9039(b). If the Commission determines that any Presidential candidate received or spent more than was allowable under the applicable statutes, it is required to notify the recipient, who is under a duty to repay the improperly received or expended amounts to the Secretary of the Treasury, 26 U.S.C. §§ 9007(b), 9008(h), 9038(b). If repayment is not made, the Commission may institute suit to recover the amounts due the Secretary, 26 U.S.C. §§ 9010(b), 9008(h), 9040(b), and it may generally seek injunctive relief to compel compliance with the pertinent statutory requirements. 26 U.S.C. §§ 9011, 9040(c). Criminal sanctions are imposed for violations of the federal financing statutes, 26 U.S.C. §§ 9012, 9042, but the Commission has no direct role in respect to the enforcement of these penalties.

The Commission's role in the administration of the public financing available in campaigns for nomination and election as President of the United States is essentially the same as the function of the Comptroller-General in settling and auditing substantially all government accounts, and in certifying amounts for payment. 31 U.S.C. §§ 41, 44, 47, 60, 67, 71, 72, 74. Like the Federal Elections Commission, the Comptroller-General has duties in recovering overpayments. 31 U.S.C. § 227.

The Comptroller-General is, of course, outside the Executive Branch. 31 U.S.C. § 41. His duties in auditing and settling accounts are not functions belonging to the Executive Department. He is often described as "a part of the legislative branch of the Government." E.g., Reorganization Act of 1949, Section 7, 63 Stat. 205. By analogy, we submit, the Commission's auditing and certifying functions are closely related to the legislative power and were assignable, under the Constitution, to an agency created for that purpose, removed from Executive dominance.

4. *Regulations and Advisory Opinions.* The FECA, as amended, gives the Commission broad authority —

> to prescribe rules and regulations necessary to carry out the provisions of this chapter [14 of Title 2 of the United States Code relating to financial reporting and disclosure.]

Any proposed regulation must be laid before Congress and may be issued only if not disapproved within 30 legislative days. 2 U.S.C. § 438. The Commission is given similar authority, subject to the same condition, to issue regulations necessary to carry out the plan for public financing for Presidential candidates. 26 U.S.C. §§ 9009, 9039.

Section 437f of Title 2 of the United States Code empowers and requires the Commission, upon request of a federal office-holder, candidate or political committee, to—

> render an advisory opinion . . . with respect to whether any specific transaction or activity by such individual, candidate, or political committee would constitute a violation of [any law relating to the financial aspects of political campaigns.]

Subsection (b) provides:

> Notwithstanding any other provision of law, any person with respect to whom an advisory opinion is rendered under subsection (a) who acts in good faith in accordance with the provisions and findings of such advisory opinion shall be presumed to be in compliance with [the laws relating to financial aspects of political campaigns].



We submit that the foregoing powers are not integral parts of the President's duty to "take care that the laws be faithfully executed," under Article II, Section 3. On the contrary, both are the kinds of function repeatedly delegated to independent agencies deliberately placed beyond Executive control.

Were one to suppose that the power to issue regulations must be characterized abstractly as belonging to only one of the three great divisions of government, it would fall most naturally in the Legislative Department. Such regulations are described as "legislative" because, when within the agency's authority, they make laws for the future in general terms. Davis, *Administrative Law Text* (3rd ed.) §§ 5.01 *et seq.* They bind the courts as well as other arms of government.

History and practice confirm this theoretical analysis. Although the power to issue legislative regulations has not infrequently been conferred upon an executive officer or department, the result is nearly always described as a "delegation of legislative power;" and the legal question is whether Congress has provided adequate standards to guide the delegate's action. *Panama Refining Co.* v. *Ryan,* 293 U.S. 388 (1935); *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935). But the practice is by no means uniform. The power to issue legislative regulations is often conferred upon independent agencies such as the Federal Trade Commission and Securities Exchange Commission which are "independent of executive authority" and exercise "quasi-judicial" or "quasi-legislative" power.

In *Humphrey's Executor* v. *United States*, 295 U.S. 602, 628 (1935), the Court said:

> Such a body cannot in any proper sense be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competition" — that is to say in filling in and administering the details embodied by that general standard — the commission acts in part quasi-legislatively and in part quasi-judicially.

Issuing general rules without fixing legal responsibility upon a particular person is plainly a "quasi-legislative" function. It follows that investing such authority in the Federal Election Commission does not violate any principle pertaining to the separation of powers even if the Commission were closely aligned to the Legislative Branch rather than truly "independent."

It would seem to follow that issuing *ad hoc* opinions and other interpretative rulings for the guidance of those subject to a statute may be fixed outside the Executive Branch. Such interpretations do not make new laws because they do not bind the courts. The interpretations cannot bind the Executive, partly because they do not make law and partly because the Executive cannot be subjected to the control of another department or agency in carrying out its functions under Article II. On the other hand, there is nothing inherently "executive" about providing an informed and internally-consistent body of expert opinion concerning the "intent of Congress" for the guidance of those subject to a complex statutory regulation. The function is very similar to the power to issue



legislative regulations giving more concrete meaning to broad statutory terms, and also to the power of interpretation vested in independent agencies under a wide range of regulatory legislation. E.g., *Gray* v. *Powell*, 314 U.S. 402 (1941); *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944). The Attorney General's bald assertion (Br. p. 117) that interpretative rulemaking falls within the executive prerogative is supported by neither his own reasoning nor the citation of authority.

In the court below, Judge MacKinnon expressed the opinion that Section 437(b) is an unconstitutional invasion of the prerogatives of the Executive Department because it provides that an individual who "acts in good faith in accordance with" an advisory opinion of the Commission "shall be presumed in compliance with" the relevant laws. Judge MacKinnon reached this conclusion because he read Section 437(b) as an attempt to give the Commission power to grant immunity from prosecution. This characterization misconceives both the purpose and effect of Section 437f(b). Section 437f(b) does not authorize the Commission to give immunity from prosecution. The discretion to prosecute or not to prosecute is vested in the Executive alone. The effect of Section 437f(b) is to set forth in more detail the elements of the crimes defined in the sections of the Criminal Code and Internal Revenue Code listed in Section 437f(b), particularly the element of criminal intent. In substance, Section 437f(g) provides that one who does an act prohibited, or fails to perform a duty prescribed, by those sections shall be guilty of a crime if he knew that he was violating the law or failed to obtain an official opinion from the source provided by law. Conversely, the accused commits no crime if he acts in reliance upon that advice, unless he acts in bad faith because he knows the advice to be erroneous. Section 437f(b) delimits the scope of the crimes much as the use

of the word "willfully" would have circumscribed them if Congress had used the word and the courts provided a definition of wilful violation along with lines indicated. E.g. *Hargrove* v. *United States*, 67 F.2d 820 (5th Cir. 1933). It provides a form of statutory defense which the best opinion supports in appropriate cases. LaFave and Scott, *Criminal Law* (1972) 365 *et seq.* The unfortunate draftsmanship should not affect the constitutional question.[65] Legislation is to be given an interpretation which avoids constitutional doubts. *Civil Service Commission* v. *Letter Carriers Union*, 413 U.S. 548, 571 (1973); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

B. *The Constitution Does Not Bar Dividing Among the President and the Senior Officials of the House and Senate, the Responsibility of Appointing Members of an Independent Commission Having Unique Duties as a "Watch Dog" Over the Political Activities of the President and Members of Congress.*

Two related constitutional conclusions flow from the nature of such of the Commission's duties as we have described.

First, they are not exclusively "executive" in any sense of the word; their assignment to another arm of government does not threaten the independence or functioning of the Executive Branch.

[65] The House Report on Section 437f states that it provides for a rebuttable presumption of compliance which would not foreclose executive prosecution. H. Rep. 93-1239, p. 9 (1974). The language of Section 437f(b) seems ill chosen, but it is not inconsistent with the view that the presumption of compliance can be rebutted only by showing that the defendant did not act in good faith reliance upon the advisory opinion. In this respect, Judge MacKinnon's interpretation seems entirely correct.



Second, the duties of the Commission discussed above are plainly such as might be constitutionally performed by an independent agency whose members are appointed by the President, subject to confirmation by the Senate.

In our view, the Commission is an independent agency removed from the control of both the Executive and Legislative Departments in the performance of its responsibilities (except, possibly, those duties involving the furnishing of information and recommendations for new legislation). We do not understand the Attorney General's casual assumption (Br. p. 110) that the Commission is "an arm of the Congress, a 'legislative agency.' " Neither Congress nor the President has any right to direct the Commission's performance of its statutory duties. Neither could properly attempt to exert influence. Neither, we infer, has a power of removal. Cf. *Wiener* v. *United States*, 357 U.S. 349 (1958). The Secretary of the Senate and the Clerk of the House have no votes in the Commission. The Attorney General misreads the statute when he states (Br. p. 110, n. 68) that "The Commission must submit proposed legislation to Congress before circulating it to any other agency or executive official." Section 437d explicitly states that the Commission shall transmit a copy "concurrently." Similarly, budget requests are to be transmitted "concurrently," 2 U.S.C. §437(d)(1), and the Commission's annual report is to be made "to the President of the United States and to each House of the Congress." 2 U.S.C. §437e. There is no suggestion here of subordination of the Executive. Nor can we follow the Attorney General in reading subserviency to the Congress into the reservation of power to either House to disapprove legislative rules or regulations issued pursuant to a delegation of legislative power. The arrangement substantially parallels the old provision for disapproving Presidential reorganization plans and the current statutes governing

rules issued by this Court. 5 U.S.C. §906; 28 U.S.C. §§2072, 2075. Senator Scott, who initiated the plan, and other members of Congress repeatedly described the FEC as an "independent commission."* The words with which the Court described the Federal Trade Commission fit precisely:

> The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with enforcement of no policy except the policy of the law. *Humphrey's Executor* v. *United States*, 295 U.S. 602, 624 (1935).

The question thus comes down to whether the Constitution imposes a rigid rule that all the members of an independent commission performing duties not belonging exclusively to the Executive Department must be appointed by the President, even though his personal interests and partisan loyalties will be involved in much of the Commission's business and his sole selection of all the members must tend to reduce public confidence in the impartiality of decisions favoring his interests.

The problem facing Congress was far from abstract. The six voting members of the Commission were to be named in 1975. In November 1976, a President and Vice President, one third of the Senate, and the entire membership of the House of Representatives would be elected. The incumbent President would be seeking nomination and election. He would be leading his Party in all the campaigns for Senator and Representative. The six new commissioners would be rendering interpretations of a new law which might well be thought to injure one major party and assist the other.

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* *See* 120 Cong. Rec. S18525 (daily ed. Oct. 8, 1974) (remarks of Sen. Scott); *Id.* at H10328 (Oct. 10, 1974) (Rep. Hayes); *Id.* at H10331 (Rep. Armstrong); *Id.* (Rep. Frenzel); *Id.* at H10344 (Rep. Heckler).



The six members to be appointed might soon be required to certify whether the incumbent President was entitled to matching funds under 26 U.S.C. §§9033-9036 in seeking nomination, and later, to determine whether his Party and he, himself, were eligible for payments under 26 U.S.C. §§9003-9005, 9008. It would be their duty to make careful audits of his accounts and obtain repayment when found due. It would also be their duty to receive other reports from him as a candidate, to determine how to publish them, and to scrutinize them for violations. How then should the six men be chosen? No one free from constitutional limitations would suggest that the soundest course would be to have all six chosen by the chief political figure with whom they must deal and whose behavior they must scrutinize. Nor would anyone argue that allowing the most powerful contestant to name all the stewards charged with enforcing the rules would be the best way to build public confidence in the stewards' rulings. To face such ancient truths of human conduct casts no aspersion upon any individual. The unsoundness of any such arrangement might appear less dramatic if a time were to come when an incumbent President named fewer than all the members, but the inherent weakness would remain.

The method of selection chosen by Congress not only avoids the pitfalls of Presidential selection but does as much as possible to build confidence in the Commission's independence and freedom from bias, short of the probably unconstitutional step of providing that the members be named by this Court. Section 437(c)(3) includes an unusual declaration emphasizing the need for public confidence in the members' freedom from every sort of influence:

> Members shall be chosen on the basis of their maturity, experience, integrity, impartiality, and good judgment and shall be chosen from among individuals who, at the

> time of their appointment, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Government of the United States.

Dividing the authority to select the six voting members of the Commission among three high ranking officials, including the President of the United States, was calculated to remove the Commission still further from any single source of influence and to guard against any one set of mind. Still further assurance is contained in the requirement that the President *pro tem* of the Senate and the Speaker of the House select "upon the recommendations of the majority leader . . . and the minority leader . . ."

It surely cannot be the position of either appellants or the Attorney-General that the constitutional prerogatives of the President are shaken if he lacks power to appoint the persons who will be charged with issuing regulations and giving interpretative opinions affecting the President's candidacy, who will determine the President's eligibility for public financing, and who will later scrutinize his accounts and reports. Few Presidents would wish so unpleasant a duty. In the end, therefore, the constitutional question is simply whether some abstract theory prevents an unfamiliar solution to a new and unique problem.

Nothing in the theory of the separation of powers imposes this rigidity. Eighteenth century students of Locke and Montesquieu differed in their understanding of the doctrine, but the prevailing view emphasized that the doctrine was not to be rigidly, but flexibly, applied. Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. Chi. L. Rev. 385 (1935). Madison himself wrote in No. 47 of the Federalist Papers that—

> His [Montesquieu's] meaning as his own words impart, and still more conclusively as illustrated by the example in his eye, can amount to no more than this,



> that where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted. *The Federalist,* No. 47, Fairfield ed. 1969, p. 140.

Madison's appreciation of the need for flexibility extended to the appointing power. He did indeed observe, as stated by appellants (Br. p. 196) that—

> each department should have a will of its own, and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of members of the others. *Id.* No. 51, p. 159.

A few sentences later, however, he added a qualification omitted from appellant's selection which we think should govern here:

> Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, would attend the execution of it. *Some deviations, therefore, from the principle must be admitted.* (emphasis added). *Ibid.*

This pragmatic approach has characterized the disposition of appointing authority from the beginning. The Chief Executive and the heads of executive departments make most appointments, but the courts have upheld delegation of the appointing authority to the Judicial Department in the case, not only of judicial functionaries such as clerks and commissioners, *In re Hennen,* 13 Pet. 230 (1839); *Rice* v. *Ames,* 180 U.S. 371, 378 (1901), but of executive officials such as supervisors of elections and a temporary United States Attorney. *Ex parte Siebold,* 100 U.S. 371, 397-398 (1879); *United States* v. *Solomon,* 216 F.

Supp. 835 (1963). Congress has repeatedly imposed a wide variety of restrictions upon the President's freedom of selection, even confining the appointment to a person or persons nominated by others. See *Myers* v. *United States*, 272 U.S. 52, 264-275 (1926) (Brandeis, J. dissenting). From the time of the Second Congress, Congress has occasionally named the individuals to perform important functions by assigning the functions to the holders of another office even though the new duties were in nowise related to the old. E.g., Act of May 8, 1792, 1 Stat. 281, creating a commission consisting of the Chief Justice of the United States, the President of the Senate, the Secretary of State, the Secretary of the Treasury and the Attorney General "to purchase the debt of the United States." See for a collection of similar instances, Note, *Power of Appointment to Public Office under the Federal Constitution*, 42 Harv. L. Rev. 426 (1929). Congress has also named individuals to public positions and specified ranks in the Armed Forces. *Ibid.* The President has been held generally to have the sole right of removal, *Myers* v. *United States*, 272 U.S. 52 (1926), but the power is denied where the duties of the office demand a high degree of independence, *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935); *Wiener* v. *United States*, 357 U.S. 349 (1958). The sum of legislative and executive practice, and of the rare judicial rulings, is that the President, generally speaking, exercises both the power to appoint and to remove, but deviations from the principle must be permitted when the special occasion requires.

The language of Article 2, Section 2, Clause 2 (p. 107 above) will bear the interpretation which time and experience have put upon it. Initially, there was debate over whether the Constitutional Convention should adhere to the method of legislative appointment provided by the Articles of Confederation and many State Constitutions or should



give the appointing power to the President. The issue seems to have been compromised by the addition of the proviso: "Congress may by law . . . ," for there was little subsequent discussion.

The proviso can be given a restrictive interpretation denying Congress the power to make appointments even though it permits the Congress to delegate the appointing power to one of a variety of officials. The words can equally well be taken to assume that Congress may of course exercise itself a function which it can vest in one of designated officials. No question of principle was at stake, only efficiency and convenience. Although Madison argued against the power, other members of the Convention held that it was indeed reserved to Congress. 1 Ann. Cong. 472, 504, 513 (1789). As we have shown, time and experience have given the words the latter meaning. The power of Congress was also sustained in the only judicial ruling to come to our attention. *United States* v. *Cooper*, 20 D.C. 104, 124 (1891). See generally, Note, *Power of Appointment to Public Office Under the Federal Constitution*, 42 Harv. L. Rev. 416 (1929).

Under Section 437c the President of the United States, the Speaker of the House of Representatives, and the President *pro tem.* of the Senate make the initial selections, but the vote of a majority in both Houses of Congress makes the appointment the action of Congress at the final step.

We address ourselves only to appointments to an independent agency, and only to the unique circumstances in which the appointments are to a watch dog commission which must scrutinize the conduct of the President and members of Congress as political candidates, and deal with them at arms' length. In appointments to positions in the Executive Department the principle stated by Madison —that the members of each department should be as little

agents as possible in the appointment of members of the other—supports the FECA practice. Madison was concerned with the dangers of excessive loyalty to the appointing authority. In providing for FECA that danger dictated the unique division of authority which Congress achieved.

In creating the Federal Elections Commission to implement one of the great measures of political reform introduced in this century Congress faced a special occasion. The Commission will occupy a unique role in our politics and government. It can succeed only if its complete independence and freedom from bias or predilection is trusted by both rival candidates and citizenry. Dividing the power of appointment so that no more than two of six members would ever owe their position to a single source is an important step in enabling the Commission to build that essential trust.

## Conclusion

The judgment should be affirmed.

Respectfully submitted,

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